

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
08 EDC 2969

## FINAL DECISION

## APPEARANCES

**For Respondent:** Rachel B. Hitch  
Brian C. Shaw  
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Post Office Box 2350  
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## **ISSUES TO BE RESOLVED**

1. Whether Respondent failed to provide *Student* with a free, appropriate public education through the development of an Individualized Education Plan (IEP)? Whether Respondent failed to provide *Student* with a free, appropriate public education through an IEP that was reasonably calculated to provide *Student* with educational benefit?

2. Whether Respondent failed to provide *Student* a free, appropriate public education in the least restrictive environment as required by 20 USCA § 1412(a)(5)(A)?

3. Whether Respondent procedurally and substantively failed to provide *Student* a free, appropriate public education by failing to provide *Student* with educational services before October 28, 2008, the date Respondent first provided services to *Student* at his private preschool placement?

4. Whether Petitioners' private educational placement was appropriate? If so, are Petitioners are entitled to the requested relief, including but not limited to, reimbursement for all costs and expenses Petitioners incurred in providing *Student* with educational costs and placement in a regular education setting beginning July 31, 2008?

## **WITNESSES**

**For Petitioner:**     *Father* (Father)  
Dr. Vivian Umbel (By telephone)  
*Mother* (Mother)  
Dr. Signe Naftel  
Dorothy Hoyle  
Edith Kahn  
Elizabeth Fouts  
Sadie Bauer  
Casey Palmer

**For Respondent:**   Ms. M.G.  
Dr. S.F.  
Ms. C.A.  
Ms. L.C.  
Ms. K.S.  
Ms. M.T.  
Ms. W.G.

## STIPULATIONS

The Order on Final Pretrial Conference in this matter included the following stipulations:

- (1) It is stipulated that all parties are properly before the court, and that the court has jurisdiction of the parties and of the subject matter.
- (2) It is stipulated that all parties have been correctly designated, and there is no question as to misjoinder or non-joinder of parties.
- (3) In addition to the other stipulations contained herein, the parties hereto stipulate and agree with respect to the following undisputed facts:
  - (a) *Student* is a “child with a disability” as that phrase is defined in 34 CFR §300.8 in that *Student* is a child evaluated as having autism, and, who by reason thereof, needs special education and related services.
  - (b) *Student* turned three years old on \*\*\*, 2008; he is now four years old.
  - (c) Upon a referral from the State Department, *Student* underwent a comprehensive psycho-developmental evaluation that was conducted by Dr. Vivian Umbel, Ph.D, at the South Miami Hospital Child Development Center (“Miami CDC”) on February 11, 12 and 15, 2008. (Petitioners’ Exhibit 2).
  - (d) Upon a referral from the State Department, *Student* also underwent a speech-language pathology evaluation conducted by Stefanie Vasquez, a speech-language pathologist, at the Miami CDC on February 14, 2008. (Petitioners’ Exhibit 3).
  - (e) As a result of the Miami CDC’s evaluations, Dr. Umbel accurately diagnosed *Student* with Pervasive Developmental Disorder – Not Otherwise Specified (“PDD-NOS”).
  - (f) PDD-NOS, sometimes referred to as “atypical autism” is a disorder on the autism spectrum.
  - (g) In April 2008, *Student* and his family moved from Argentina to Orange County after the State Department assigned *Student*’s father to a post in North Carolina.
  - (h) *Student* is eligible for special education instruction and related services.
  - (i) *Student* requires speech and language instruction as a related

service.

- (j) [Respondent] The County provides one hour of occupational therapy a week to *Student*.
  - (k) *Student's* IEP Team met to determine his eligibility on July 10, 2008, and thereafter, the IEP team held meetings on July 22, 2008, July 30, 2008, and October 13, 2008.
  - (l) On July 22, 2008, the IEP Team developed the Annual Goals and Short Term Objectives/Benchmarks listed on the IEP identified as Petitioners' Exhibit 1.
  - (m) On July 30, 2008, [Respondent] Respondent proposed to provide *Student* with the following: (1) two 90-minute sessions of special education a week; (2) two 30-minute sessions of occupational therapy a week; (3) all services would be provided at a "Playgroup" at P Elementary School Elementary School; (4) *Student* would only attend the school when he was to receive those four hours of special education and related services each week.
  - (n) On October 13, 2008, the IEP team added thirty minutes of speech and language therapy a week, with a focus on articulation, to *Student's* IEP.
  - (o) *Student's* parents, *Mother* and *Father*, placed him at Our Play House preschool in September of 2008, where *Student* remains enrolled today.
  - (p) *Student* did not receive special education services from the Respondents before October 28, 2008.
  - (q) From July 22, 2008 through October 27, 2008, all of *Student's* special education and related services were funded privately by Petitioners *Father* and *Mother*
  - (r) *Mother* and *Father* have supplemented the services provided by the Orange County Schools by privately funding an additional four hours a week with an autism facilitator, an additional one hour per week of speech-language therapy focused on pragmatics, and an additional hour a week of occupational therapy.
  - (s) In August of 2008, Mrs. M requested the credentials of members of the IEP team, in particular Ms. K.S., a current service provider.
- (4) It is stipulated and agreed that, prior to the hearing in this matter, opposing counsel was furnished a copy of each exhibit identified by Petitioners as expected to be introduced at trial.

(5) It is stipulated and agreed that each of the exhibits identified by Petitioners is genuine and, if relevant and material, may be received in evidence without further identification or proof, except that Respondents generally reserve the right to object at trial on grounds of relevance and materiality, and on the issue of the authenticity of a document if new information in that regard is received during the course of the hearing.

(6) It is stipulated and agreed that opposing counsel was furnished a copy of each exhibit identified by Respondent, except for the audio recordings that were already in the possession of the Petitioners, and provided to Respondent with Petitioner's Requests for Admissions.

(7) It is stipulated and agreed that each of the exhibits identified by the Respondents is genuine, and, if relevant and material, may be received in evidence without further identification or proof, except that Petitioners generally reserve the right to object at the trial on grounds of relevancy and materiality.

(8) A list of the names and addresses of all potential witnesses Petitioners may have offered at the trial was provided to opposing counsel in advance of the hearing.

(9) A list of the names and addresses of all known witnesses Respondent may have offered at the trial was provided to opposing counsel in advance of the hearing.

(10) No additional witnesses were discovered after the preparation of the order on final pre-trial conference.

(11) Additional consideration was given to a separation of the triable issues, and counsel for all parties were of the opinion that a separation of issues in this particular case would not be feasible.

(12) On May 19, 2009, the parties stipulated to the admission of the following exhibits for Respondent: R15, R31, R43, R67, R70, R71, R95 (2<sup>nd</sup> page, 1<sup>st</sup> page is already in evidence), R145, R147, R148, R149, R155, R158, R160, R161, R162, R163, R164, R165, R166, R167, R168, R170, R171, R172, R173, R175, R177, R178, R180, R181, R182, R183, R187, R188, R191, R200, R204, R206, R208, R209, R211, R225, R249, R251, R252, R254, R256, R257.

## **FINDINGS OF FACT**

Based upon the stipulations of record and the preponderance of the admissible evidence, the undersigned finds as follows:

### **I. BACKGROUND**

#### **A. PROCEDURAL BACKGROUND**

1. Petitioner *Student* is four year old preschool student residing with his parents, Petitioners *Father* and *Mother* in Orange County, North Carolina. *Student* has been diagnosed as mildly autistic with Pervasive Development Disorder Not Otherwise Specified (PPD-NOS).

2. In April 2008, Petitioners moved to Orange County from Argentina, where Petitioners had lived while Petitioner *Father* was stationed as a special agent with the US Department of State, Diplomatic Security Service.

3. Over a series of three IEP meetings in July 2008, Respondent developed an IEP providing *Student* 3 hours of special education a week and 1 hour of occupational therapy a week. Respondent offered *Student* a placement in a speech-language playgroup operated by Respondent at P Elementary School, providing opportunity for interaction with nondisabled peers in a Head Start program. *Student's* parents disagreed with the proposed IEP, removed *Student* from Respondent's school system, and placed *Student* in the *OPH*, a private preschool in Orange County. *Student's* parents also paid for private speech therapy, occupational therapy, and ABA behavioral therapy for *Student*.

4. On November 25, 2008, Petitioners initiated this action by filing a petition with the Office of Administrative Hearings, challenging the Individualized Education Program (IEP) developed by Respondent for *Student*.

5. In their petition, Petitioners challenged the IEP on various grounds, including, (1) Respondent's failure to provide a free and appropriate public education, (2) Respondent's failure to determine the nature and extent of the special education and related services that *Student* needs, and (3) Respondent's failure to provide FAPE in the least restrictive environment. Petitioners described the following facts supporting their petition:

*Student* is diagnosed as an exceptionally bright autistic child who is enrolled in a private pre-school setting as the school district did not offer him daily classes with typically developing peers. He receives 3 hours a week with a behaviorist from Respondent, and 4 additional hours is provided by his family. Similarly, Respondent gives him 1 hour a week with an occupational therapist, and ½ an hour for speech and language. His family pays privately for him to have 1 more hour OT and 1 more hour speech and language. *Student* requires all the family provides and more hours than this in order to learn proper behaviors and social interactions and therefore, to receive a free and appropriate education. The public education he was offered was [sic] does not allow him to access the curriculum. It consisted of a playgroup for approximately three hours, he needs to be with typically developing children full-time in order to model and learn proper behaviors, his parents privately provide this at school.

Additionally, they request that *Student* have a behavior plan in place, developed with a behaviorist who is with them most of each day. He will need speech and language daily in order to learn pragmatic skills and appropriate responses and OT must be provided by Respondent as well.

*Student* needs not to be in a special needs classroom, but must stay with typically developing peers in order to allow him to model and continue to learn the skills necessary for him to continue to be educated in the least restrictive environment. This should be a structured room, with supports for his behavior and a small student teacher ratio. Finally, he seeks reimbursement for transportation to the school and for legal fees.

(Petition, p 1)

6. Under IDEA, Petitioners seek reimbursement of expenses for the private preschool placement, including tuition, specialized instruction, and related private services.

7. Respondent denies any violation of IDEA, and maintains that its IEP provided *Student* with a free and appropriate public education in the least restrictive environment.

#### B. *Student's* EDUCATIONAL HISTORY

8. Before Petitioners moved to North Carolina, *Student* was enrolled for a year in a preschool called ("SJS") in Buenos Aires, Argentina where *Student's* family was stationed by the State Department. Midway through *Student's* first year of preschool, when *Student* was two years old, *Student's* teachers advised *Student's* parents of serious concerns about *Student's* behaviors in the classroom setting. (Pet Ex 2; Resp Ex 39).

9. *Student's* teachers reported that while *Student* was often "sweet and affectionate," he regularly exhibited troubling behaviors. *Student's* teachers reported that *Student* "d[id] not play with other children," but consistently spent most of his class time in single or parallel play. That is, *Student's* play was notable for its lack of any interaction with his peers as *Student* would play near his peers, but not with them. (Tr. Vol. 2, 128-130; Resp Exh 39; Tr., Vol. 7, pp 1389-1390). *Student's* play was very focused as he played "with a lot of concentration," and would "stay in the same place for long periods while he plays." Resp Ex. 39. (Tr. Vol. 2, pp 128 -130 - Umbel; Tr. Vol. 2, pp 156-157, 158-162; Resp Ex. 25 & 39; Pet Ex. 2)

10. The SJS teachers explained that *Student* consistently would "destroy" his creation if someone got near him, or touched the materials he was using. Generally, on these occasions, *Student* threw and kicked toys, made quick sudden movements, shouted or hit his head or his body. *Student* exhibited a similar response when other children touched him appropriately, or approached him to offer to help him. *Mother* and *Father* called these outbursts "meltdowns."

11. *Student's* meltdowns varied in severity and duration. Often, *Student* reflexively threw his head and body backwards onto the ground, hitting his head and body on whatever surface or object happened to be there, without regard for his physical safety. (Tr. Vol. 2, p 152) *Student's* teachers also reported that *Student* lined up stickers in symmetrical lines, and was prone to having a meltdown if his stickers were disturbed or moved by a peer or teacher. (Tr. Vol. 2, pp 128-130; Resp Exh

39). *Student's* meltdowns were also triggered by teachers imposing normal limits on children in classrooms, such as waiting one's turn, and transitioning from one activity to another. (Tr. Vol. 2, pp 128-130) (Pet Exs 2 & 39).

12. *Student* exhibited these challenging behaviors in the classroom, in social settings, and at home. While exhibiting these behaviors, *Student* was not able to verbalize his thoughts, feelings, or experiences at all. See, Tr. pp 118-119, 153:-154, 572-576; Pet Exs 2, 19 & 35.

13. Because SJS had no teachers with background or training to address *Student's* "patterns of behavior, SJS "deem[ed] it necessary" for *Mother* and *Father* to "consult with a developmental/behavioral pediatrician or mental health professional" before *Student* would be allowed to enroll for the subsequent school year. (Pet Ex. 25)

### C. *Student's* INITIAL EVALUATION AND DIAGNOSIS

14. *Mother* and *Father* disclosed the SJS Referral to the State Department officials, as they were required to do while stationed outside of the United States. (Tr., pp 42- 43, 163-164; Pet Ex 23). In response, the State Department coordinated a comprehensive psycho-educational evaluation for *Student* to be conducted in Miami, Florida by Dr. Vivian Umbel. The State Department also coordinated a speech-language evaluation to be conducted by Stefanie Vásquez, M.S., CCC-SLP, a speech language pathologist. (Pet Ex. 3). Both Dr. Umbel and Ms. Vasquez specialize in evaluating children raised in bilingual environments. (Pet Exs. 2, 56).

15. The Miami Evaluations were conducted over a four-day period on February 11, 12, 13 and, 14, 2008. (Pet Exs 2, 3). Based on her comprehensive evaluation of *Student*, Dr. Umbel concluded that "[*Student*]" falls within the spectrum of Autism," and that *Student's* delays and behaviors met the diagnostic criteria for Pervasive Developmental Disorder - Not Otherwise Specified (PPD-NOS). (Pet Ex. 2).

a. Dr. Umbel's diagnosis was based upon a number of findings that were directly relevant to *Student's* educational planning. Dr. Umbel found that *Student* was impaired in (1) his use of nonverbal behaviors to regulate social interactions, and in (2) his level of social and emotional reciprocity. Dr. Umbel concluded that *Student* was "delay[ed] in the development of spoken language," and showed delays in pragmatic language skills.

b. Umbel specifically found that *Student* exhibited the following: (1) "decreased ability to sustain a conversation with others;" (2) "imitative/creative play [that was] not appropriate to his developmental level;" and (3) "inflexible adherence to specific, non-functional routines, and repetitive motor mannerisms." *Id.* One of the cumulative effects of *Student's* delays and impairments was *Student's* "fail[ure] to develop peer relationships appropriate to his developmental level." *Id.*

16. Dr. Umbel also found that *Student* exhibited "well-developed nonverbal intellectual abilities" and noted the gains that *Student* had recently made in the area of language development. *Id.* Based on *Student's* demonstrated cognitive abilities, and



*Student's* recent gains in his language development, Dr. Umbel's prognosis for *Student's* continued improvement was "favorable," so long as *Student* received appropriate invention services without delay. *Id.*

17. Dr. Umbel made five recommendations relating to *Student's* educational needs, including:

- a. Special education school placement sensitive to [*Student's*] communication problems in order to advance his verbal and nonverbal learning experiences and foster peer socialization skills. Placement should be in a small (low teacher-pupil ratio) structured language-intensive classroom where behavior modification techniques are utilized.
- b. Speech-language therapy with a focus on the development of [*Student's*] verbal and nonverbal communication skills. Encouraged should be the use of eye contact, verbal and motor imitative behavior, decontextualize and symbolic use of objects, and reciprocal/sustained social interaction through the use of turn-taking activates.
- c. Occupational therapy evaluation with a focus on motor imitation and planning issues.
- d. Parent skills training in the use of behavior management techniques.
- e. Comprehensive psycho-developmental evaluation in one year.

(Pet Ex 2)

18. On February 14, 2008, Stephanie Vasquez conducted a Speech and Language Evaluation of *Student*. (Pet Ex 3). Vasquez recommended re-evaluation of *Student's* expressive and receptive language skills in six months, and further evaluation of *Student's* social pragmatic skills relating to functional communication and therapy provided as needed. She also suggested placement in a "language-based preschool setting (English speaking)." (Pet Ex 3, p 7)

19. Based upon the comprehensive psycho-evaluation and speech-language evaluation, and *Student's* diagnosis with PPD-NOS, the State Department relocated Petitioner *Mother's* position to North Carolina so *Student* could receive the necessary educational services.

## **II. THE DEVELOPMENT OF THE COUNTY'S IEP**

### **A. INITIAL MEETINGS AND EVALUATIONS WITH RESPONDENT**

20. *Father* first spoke with Respondent's coordinator of special education services, *N.K.*, and scheduled an initial meeting with Ms. *N.K.* for May 23, 2009. (Tr. Vol. 2, 176:6-14, Testimony of *Father*, Tr. Vol. 2, 177:3-17). Before meeting Ms. *N.K.*, *Father* provided *N.K.* with copies of the State Department's referral of *Student* for the comprehensive psycho-evaluation and speech-language evaluation, *Student's* comprehensive psycho-evaluation, and *Student's* speech-language evaluation. (Pet Exs 2-3, 23).

21. On April 29, 2008, TEACCH conducted an intake interview with *Student*, and summarized that interview in a May 27, 2008 letter. (Pet Ex 41, p. 1) During that intake interview, TEACCH observed *Student's* behavior regarding independent play and ability to sustain social interaction. Dr. Merkler, who conducted this interview, noted the following points, among others:

a. *Student's* language development was delayed, he did not respond to his name, but responded to other noises in his environment. *Father* was "not concerned about his delays in language since he was growing up in a bilingual environment." (Pet Ex 41, p. 1)

b. TEACCH also noted that "since *Student's* language has increased, his tantrums have decreased." (Pet Ex 41, p 2) TEACCH noted there was no need formally to re-evaluate *Student*, because he already had a thorough evaluation with a diagnosis consistent with mild autism. (Pet Ex 41, p. 2) TEACCH noted that *Student* demonstrated many strengths and a "strong potential for learning," given a "well-structured, individualized educational program." (Pet Ex 41, p. 2) TEACCH recommended a special education preschool placement for *Student*. (Tr. Vol. 6, p. 1123, lines 12-22; Tr. Vol. 7, p. 1363, lines 6-12; )

22. In April 2008, Edie Kahn with Triangle Therapy conducted an occupational therapy initial evaluation of *Student*. Kahn recommended weekly occupational therapy for *Student* to address (1) *Student's* slight delays in self-care skills regarding dressing, (2) *Student's* difficulties in fine motor skills such as writing simple activities, and (3) *Student's* weakness in balance and coordination skills. (Pet Ex 4, p. 3).

23. On May 23, 2008, Respondent completed an Exceptional Children Referral for *Student*, and received permission to gather information about *Student* by conducting screening or evaluations. (Resp Exs 249, 251)

24. By email dated May 27, 2008, despite knowing of *Student's* autism diagnosis, Ms. *N.K.* advised Petitioners that *Student* did not qualify as "a child with a disability" since *Student* was not delayed in any area of development. However, given Petitioners' concerns that *Student's* behaviors might interfere with *Student's* ability to successfully interact with peer and/or be successful in an educational setting, Ms. *N.K.* agreed to conduct two observations of *Student* in the P Elementary School Elementary playgroup. (Pet Exs 14, 15).

25. On May 30, 2008, Respondent's *K.S.*, speech therapist, and Kristin *K.T.*, occupational therapist, observed *Student* as he participated in a playgroup of four or

five children. *K.T.* and *K.S.* lead the activities of the playgroup. During their observation of *Student*, they conducted a developmental evaluation of *Student's* speech and language skills, completed a Pragmatic Language Checklist, and completed a Teacher Rating Scale. (Pet Ex 21)

a. The North Carolina Pragmatic Language Standard Course of Study for preschoolers includes: goals of using one to two word utterances to communicate sentence-like meanings to others in the school environment, responding to and using polite forms, producing a variety of assertive and responsive meaningful communicative interactions, and observing turn-taking rules in the classroom or in social situations. (Pet Ex 37) *K.S.* determined that due to *Student's* ability to perform a significant majority of the tasks on the checklist, *Student* scored in the "average range" in the speech and language areas, and in the pragmatic and social communication areas. (Pet Ex 61, pp. 5-6).

b. Using the Teacher's Rating Scale, *K.S.* noted that *Student* presented some mild difficulties using appropriate eye contact, maintaining topic, and appropriate interruption. However, *Student's* difficulties "did not interfere with [*Student's*] ability to participate in the playgroup or his learning during the observation." (Pet Ex 21 p 3; Pet Ex 61, p. 3).

c. *K.T.* noted there were three other children in the second playgroup session in which she observed *Student* in June 2008. Ms. *K.T.* observed that *Student* transitioned well, was not bothered by the noise during a musical activity, and had a good grasp when using a pretzel to pick up goldfish. Although *Student's* hands got sticky, he did not really seem to mind. He showed other kids that he had caught a fish stating "look, I caught a fish." *Student* drank from a cup independently, and was able to use the bathroom independently, except asking for assistance with a button.

26. Ms. *K.T.* noticed that *Student* exhibited some nice self-care tactics. *Student* needed "a little assistance to put the scissors in his hand, but he did really well cutting the lines" when given a square. *Student* did pretty good for his age, given that a square is a harder shape, and he needed some help cutting it out. Ms. *K.T.* observed that *Student* needed some assistance in completing simple puzzles.

27. In June of 2008, Respondent's Ms. M.T., school psychologist, observed *Student* in the P Elementary School Elementary playgroup. She observed that *Student* was cooperative, willing to participate, and frequently responded to questions presented to the group. *Student* did not have difficulty transitioning from one activity to the next, and attempted to interact with other students. "Overall, [*Student*] appeared to adjust well to the small group setting with two adults coordinating the activity." (Pet Ex 20).

## B. IEP MEETINGS

28. The IEP team generally consisted of Respondent's representatives: Ms. L.C., certified special education teacher in birth-kindergarten and designated LEA representative; Ms. M.T., school psychologist; and *K.S.*, special education teacher/speech language therapist. Casey Palmer, Petitioners' private autism

consultant, and Petitioners *Father* and *Mother* attended the IEP meetings on behalf of Petitioner *Student*. At times, *Student's* grandmother or *L.D.*, a family friend, also attended a meeting. The IEP team met on July 10, 2008, July 22, 2008, and July 30, 2008.

a. An audio recording of the July 10<sup>th</sup> (Pet Ex 9) and July 30, 2008 (Pet Ex 10) meetings are the best evidence of what occurred during those meetings.

b. During the IEP meetings, the IEP team relied upon Dr. Umbel's psycho-evaluation, Ms. Vasquez' speech language evaluation, Ms. M.T.'s summary of her June 2008 observation of *Student* at P Elementary School playgroup, and an interview summary from TEACCH. It relied upon information available about *Student's* autism spectrum disorder, and considered information available about *Student's* history. (Pet Ex 6, p. 4) The IEP team also considered the private occupational therapist's evaluation done by Edie Kahn of Triangle Therapy, and the speech and occupational therapy observations done by *K.S.* and *K.T.* (Pet Ex 6, p.5)

#### July 10, 2008 IEP Meeting

29. At the July 10, 2008 IEP meeting, the IEP team determined that *Student* was eligible for special education and related services, ie. occupational therapy, as a child with autism, but was ineligible for speech language services. (Resp Ex 31)

a. *Father* described *Student's* specific needs, and expressed Petitioners' concerns regarding *Student's* language skills, behavior, rigidity, and drooling.

b. *K.S.* shared her assessment and observations regarding *Student's* pragmatic language skills. *K.S.* looked at:

[*Student's*]...requesting, responding, describing statements, acknowledging and performances and also readings, initiations, attending, responding to peers, and interruptions.

(Pet Ex 9) *Student* scored in the average range in all areas. Ms. *K.S.* noted that overall, *Student* was able to greet, express responsive needs, answer questions, and give significant information for her comprehension of what he was talking about. *Student* had some mild difficulty with appropriate eye contact, maintaining topic of conversation, and interrupting appropriately.

30. Kristin *K.T.* shared her observations regarding *Student's* occupational therapy needs. She observed that overall, *Student's* "fine motor skills are in the low average range, he does have a history of sensory issues." She opined that *Student's* sensory processing issues did not affect his ability to participate in a small group.

31. Ms. M.T. shared her observations of *Student* from the June 2008 playgroup session. Ms. Tyberg noted that *Student* was "getting...intense feedback all the time, he was repeating words, he was even initiating, 'I am in the kitchen' and they were playing outside." Tyberg noted she did not see any sensory issues during a music activity.

32. Ms. Tyberg summarized the report from *Student's* preschool in Argentina where *Student* experienced problems and tantrums in a class where "there were fifteen (15) students in the classroom."

a. Tyberg noted that, while attending SJS, *Student's* "language was not well-developed and he used one word to communicate." *Student's* SJS teachers reported "there were occasions when, frustrated, *Student* hit or pushed other children." *Father* responded that, "That [issue] actually has gotten worse. That component we found has gotten worse, whereas the destruction of things has gotten a little bit better."

b. Ms. Tyberg noted that *Student* "appeared to have significant difficulties with communication, social interactions, and behavior management in the school environment."

33. *Father* commented that *Student* modeled behavior really well as part of the P Elementary School playgroup in May and June 2008, and that the playgroup staff "prompted him quite a bit, because that is your job as teachers and that is what you do." *Father* remarked that *Student* transitioned well in the P Elementary School playgroup, partly because the staff in the playgroup used pictures.

34. During the meeting, the IEP team discussed *Father's* concerns about language communication from a social perspective, as opposed to a speech/language perspective. Casey Palmer of New Hope ASD Consulting described *Student* as needing the opportunity "to be coached in social language, and interaction and behavioral supports." Palmer indicated that social interaction and appropriate language use was important in planning.

35. *Father* agreed, there are "articulation issues that we have addressed and I wouldn't want to see those overlooked." Ms. K.S. responded that the evaluation from Miami found that *Student's* "articulation" issues were mild, and it was appropriate for where he was in his language development. She suggested monitoring *Student's* articulation.

36. Ms. L.C. stated that Respondent would monitor *Student's* articulation issues to see if more intervention was necessary. *Father* asked Respondent's representatives, "Why not provide him with the services now and then take them away when you don't need them anymore?" Ms. K.S. responded that some speech errors are developmentally appropriate. Ms. Tyberg noted that, according to the psychological evaluation from Miami, *Student's* verbal skills were in the average range.

#### July 22, 2008 IEP Meeting

37. On July 22, 2008, the IEP team reconvened, and congenially shared goals and objectives, with each side giving and taking suggestions. (Tr. Vol 4, Testimony of Casey Palmer; Tr. Vol 6-7, Testimony of Ms. L.C.) While the team was unwilling to include goals on social pragmatic language, they included goals on the IEP for interaction with peers, ie. a social goal, and separated the social and play goals. *Father* then left the meeting to attend a previously arranged doctor's appointment.

a. A preponderance of the evidence showed that after that, the team's discussion immediately moved from the goals and objectives to the time required to implement. There was:

no conversation amongst the group about how *Student* would be able to-- what would be necessary to enable *Student* to make progress towards these specific goals and objectives.

(Tr. Vol 4, 718:17-719:23 (March 26, 2009) (Testimony of Casey Palmer) In other words, the team did not discuss how long it would take to work on these goals or the appropriate location.

b. Ms. Palmer was particularly concerned by this, given the stress given by the goals regarding "typically developing peers" and a "daily routine." (*Id.* 716:7-717:17, Palmer. Without this routine, Palmer did not believe that *Student* was receiving an early intensive education as is necessary for children on the autism spectrum, and without which they cannot generalize learned behaviors. (*Id.* 711:14-713:5, Palmer)

c. At hearing, Ms. K.S. confirmed that there was no other discussion between the discussion of development of *Student's* goals and the discussion of the amount of time (hours) *Student* would receive in the P Elementary School playgroup to implement those goals. She acknowledged that:

Ms. K.S.: We wrote behavior goals ---- to address his behaviors.

Q Right. And did you talk about the services that would be required in your view for him to make progress on those goals?

A Yes, the amount of hours.

Q Right. You talked about time?

A Uh-huh.

Q So you looked at the goals, talked about time?

A Yes.

Q Nothing in the middle?

A Not that I can recall.

(Tr. Vol . 7, 1324:8-20, K.S. Testimony).

38. Respondent's IEP team members offered *Student* three hours per week of special education services, in two 1.5 hour sessions, at the P Elementary School Elementary playgroup. Respondent explained that it would expand the playgroup by one day, so *Student* could attend two 1.5 hour session per week. Ms. L.C. explained that the proposed playgroup would be similar to the playgroup at that time. The playgroup existing at that time was staffed by a speech pathologist and occupational therapist and consists of two to four kids with special needs.

39. Petitioner *Mother* disagreed with the placement as *Student* had been participating in a daily preschool program with other typical kids, along with a special educator. Casey Palmer and *Mother* did not feel that the playgroup was the right

setting, and that 3 hours per week was not enough time for *Student* to work on all the IEP goals.

41. The team also discussed other local programs. After *Mother* expressed concerns that Frank Porter Graham would not accept *Student* in a normal slot without a diagnosis, *Ms. L.C.* agreed to contact Ruth Miller at Frank Porter Graham, and Judy O'Connell at Center for Development and Learning at the University of North Carolina at Chapel Hill to verify whether these programs would enroll *Student* in a "typical" slot other than through Respondent's referral.

42. *Ms. L.C.*, as the designated LEA representative, noted that the full continuum of services is offered to preschoolers needing special education and that amendments to IEP minutes could certainly be made. (Pet Ex 47, p. 334). The team decided it would further explore the placement decision, gather more information, and reconvene at a later date. (Resp Exh 26) The IEP team did not make a decision regarding placement that day. (Pet Ex 6 p 3).

#### July 30, 2008 IEP Meeting

43. On July 30, 2008, the team initially discussed the following items: adding goals under sensory processing for calming techniques, *Father's* concerns about *Student's* negative behavior and anxiety, and *Father's* desire that *Student* interact with typical peers. *Ms. L.C.* noted that the issue for that day's meeting was to decide the location of services.

44. *Ms. L.C.* reiterated that Respondent's IEP team members were recommending Respondent provide *Student* with three hours of special education instruction in two ninety-minute sessions. The special education instruction would be provided in a "playgroup option," and provide *Student* an opportunity to interact with Head Start children and children with speech impairments. *Ms. L.C.* also discussed the Title I preschool class, which is for four-year olds, as an option of "typical peers" with whom *Student* could interact. *Ms. L.C.* noted that the typical peer group would have to be pulled out of their rooms to join the playgroup, because the programs in which the typical children were participating had requirements for participation.

45. The team discussed blended full-day placements at Frank Porter Graham and Children's Learning Center. Respondent's team members advised Petitioners that those placements are for students needing full-time special education, and that Respondent's team members did not believe *Student* needed such a program to make progress on his IEP goals. (Pet Ex 71, p. 2) Respondent's IEP team members informed Petitioners that the placements at Frank Porter Graham and the Children's Learning Center had teacher/pupil ratios that were similar to the class in which *Student* had not been successful in Argentina.

46. Although *Student* might benefit from attending preschool, Respondent's team members thought a different environment like the "playgroup" was necessary to meet *Student's* needs.

a. Respondent's team members thought the P Elementary School playgroup offered the small, structured, language-intensive environment recommended by Dr. Umbel, Ms. Vasquez, and TEACCH. The TEACCH Center had noted that *Student's* tantrums had decreased as his language skills improved. (Pet Ex 6, p. 3)

b. Ms. L.C. informed Petitioners that Respondent's recommendation was based upon the goals in the IEP, training of the teachers in the playgroup, and *Student's* age level, ability, and learning characteristics set out in the evaluations. (Pet Ex 6, p. 3)

47. Based on the assessments and evaluations provided, Respondent's team members opined that three hours per week of specialized instruction was sufficient for *Student* to make progress on his IEP goals. (Pet Ex 6, p. 3.) In Respondent's opinion, the offered educational placement chosen was the least restrictive environment in which *Student's* needs could properly be addressed. (Pet Ex 6, p. 2)

48. Respondent's IEP team members advised Petitioners that if *Student* needed additional behavior supports, the IEP team would revisit the issue of adding increased behavior services to *Student*. (Pet Ex 6, p. 4)

49. The audio recording of that meeting revealed that *Father* and *Mother* strenuously disagreed with the level of services and the level of inclusion in the regular education setting that Respondent's representatives were proposing. (Pet Ex 10, Audio beginning at 12:22:40; 42-46) Petitioners advised Respondent's team members that *Student* would need more than 3 hours of special education per week in a typical preschool to address the goals on *Student's* IEP. (Pet Ex 71, p. 3)

50. The audio recording of the July 30, 2008 meeting showed how Petitioners advised Respondent's team members of Petitioners' primary reasons for disagreeing with Respondent's proposed provisions of special education services to *Student*. These reasons were:

(a) Respondent's IEP team members would not articulate how they arrived at the decision to place *Student* in a highly restrictive setting or how they had concluded that three hours per week of participation in any form of preschool would be sufficient to meet *Student's* needs; and

(b) Petitioners believed that *Student* could derive educational benefit in a less restrictive environment than P Elementary School offered, and,

(c) *Student* needed to be placed in a less restrictive setting that produced natural opportunities to learn and apply those skills in order to develop appropriate, adaptive peer-interaction and socialization skills,

(Pet Ex. 10, Audio, July 30, beginning at 19:58; Pet Ex 40, p 158).

51. *Father* asked Respondent's team members how Respondent could deliver special education services to *Student* in a private preschool setting if *Mother* and *Father* were able to find a regular education private preschool that would enroll *Student* for the coming year. (Pet Ex. 10 - Audio recording of July 30, beginning at 46-51) *Father* also



asked why shouldn't *Student* be in a full-day program. Ms. M.T. responded that Respondent's representatives did not disagree with a preschool setting for *Student*, but were talking about the amount of specialized instruction time Respondent would provide *Student*. Ms. Tyberg and Ms. L.C. stressed that the specialized instruction is the financial responsibility of the school, while regular preschool is up to a child's parents. (Pet Ex 71, p. 3)

52. Petitioners and their advocates repeatedly requested that Respondent's team members provide an explanation or justification for the proposed number of hours of special education, and the proposed placement at P Elementary School playgroup. Petitioners asked how Respondent's team members arrived at three hours per week of special education services, who was teaching the playgroup class, and what were the staffs' experience. (Pet Ex 10).

53. Ms. Palmer stressed *Student's* need for special instruction to meet his behavior and social goals. Based on DPI's article on Best Practices for Autism, Palmer recommended the team provide 25 hours of special instruction per week to meet the goal of getting *Student* ready for kindergarten. Palmer thought that a small setting will not prepare *Student* for kindergarten. (Pet Ex 71, p. 3)

54. A preponderance of the evidence established that Respondent's team members never provided Petitioners with sufficient justification explaining how it determined three hours per week of special education services per week would help *Student* meet his IEP goals. While Respondent's team members seemed to rely on their experience and expertise in special education, their answers to Petitioners' specific questions on this specific issue were vague and not individualized to *Student* and his IEP goals.

55. At hearing, Respondent argued that as of July 23, 2008, Petitioners understood the makeup of the proposed P Elementary School playgroup for the 2008-09 school year. They pointed to Petitioner's July 23, 2008 email where Petitioner advised Dr. Merkler that the offered playgroup placement would include "5 boys with speech delays but not social delays...and 2 teachers." (Pet Ex 40, p. 140)

56. However, the preponderance of the evidence proved Respondent provided inconsistent information to Petitioner about the students who would attend the proposed playgroup.

a. During the July 30, 2008 IEP meeting, Respondent advised Petitioners that the 2008-09 P Elementary School playgroup would consist of 2-6 students. Ms. L.C. advised the proposed playgroup would be a continuation of the same playgroup *Student* had participated in during the May and June 2008 observations. (Tr., vol. 7, 1234:5-1235, April 3, 2009 testimony of Ms. L.C.).

b. Yet, when Petitioners questioned Respondent's team members for more specifics, Respondent's IEP team members were unsure of the number of students that would comprise the proposed P Elementary School playgroup when the 2008-09 school year would start. Neither did Respondent know if any of the students in the playgroup would have special needs, and what were those specific needs.

c. The preponderance of the evidence established that at the beginning of the 2008-09 school year, the actual P Elementary School playgroup was a self-contained special education classroom comprised of two students with speech-related disabilities, and two teachers. (Pet Ex. 11, Audio of IEP Meeting October 13, 2009 1:17:54-18:44).

57. Petitioners asked Respondent during the July 30<sup>th</sup> IEP meeting, who would teach the proposed playgroup. Respondent advised that *K.S.* would be one of the teachers, but did not know who would be the other teacher in the class, or the qualifications of the second staff member in the playgroup.

58. Neither did Respondent know what group of “typical peers” *Student* would interact with during those 3 hours per week. Respondent merely suggested possibilities of “typical peer” groups, such as kids from a Head Start class, or a More at Four class.

59. During this meeting, *Father* also requested an instructional or implementation plan from Respondent’s team members, specifying how *Student’s* IEP goals would be addressed at during the P Elementary School playgroup. She noted that Durham and Chatham Counties provided such plans for their special education students. The evidence showed that Respondent’s team members could not explain how it would address *Student’s* goals during the playgroup. Instead, Respondent responded that the staff could work on many of *Student’s* goals at one time. Ms. Tyberg indicated that once the classroom teacher has developed a plan for implementing *Student’s* goals, an instructional plan could be provided. Ms. L.C. added that “the child dictates a lot of what is going on...the teacher is going to switch to tolerate appropriate responses.” At the close of the meeting, Ms. L.C. requested that Petitioners provide her with examples of implementation plans.

60. At the end of the July 30<sup>th</sup> IEP meeting, Petitioners verbally notified Ms. L.C., the designated LEA Representative, and Respondent’s other IEP team members that they intended to enroll *Student* in a private placement. (Pet Ex. 10 - audio recording of July 30 IEP Team meeting, beginning at 46:40)

61. At the end of the July 30<sup>th</sup> meeting, Petitioners also requested Ms. L.C. present them with a DEC 5 Notice. Ms. L.C. responded that, “Now we’re in training four days next week, I am not sure how quickly this can get to you, but I’ll be happy to - I will pass this on to my director” whom she confirmed, seconds later, would write the DEC 5. Pet Ex. 10 (Audio of July 30, 2008 Starting at 50) This evidence implied that Ms. L.C., as the LEA for the team, either did not think she was authorized to answer Petitioners’ questions and/or did not know how to write the DEC 5 given Petitioners’ concerns. Subsequently, Ms. L.C. authorized someone outside of the room, later revealed as Director Ms. M.G. who was not a member of the team, to make the decision about the DEC 5.

62. The preponderance of the evidence at hearing established that Ms. M.G. did not write the DEC 5. Instead, she passed it on to Respondent’s attorney, who was neither present in the room when the IEP team made its decision, nor a member of the team. (Tr. Vol. 5, 858:16-23 (March 27, 2009) (Testimony of Ms. M.G.)).

63. A preponderance of the evidence at hearing showed that Respondent's representatives on the IEP team never presented Petitioners with a DEC 6 requesting either Petitioners' consent or Petitioners' written refusal to consent, to the provision of the services in *Student's* IEP. (Tr Vol, 2 286:15-287:14; Tr. Vol. 6, 1165:5-1166:22 (Testimony of Ms. L.C.); Pet Ex. 10, Audio, beginning at 46:00))

64. In fact, *Ms. M.G.* admitted at the administrative hearing, that Respondent failed to present *Father* or *Mother* with a DEC 6 Form at any time, before she issued a DEC 6 to Petitioners at the October 13, 2008 IEP Meeting. (Tr. Vol. 5 856:2-3, *Ms. M.G.*)

#### Petitioners' Request for Details On Implementing IEP Services

65. Within 4 hours after the July 30 IEP meeting concluded, *Father* sent an e-mail to *Ms. L.C.* with the following request:

I would like to go ahead and set up a meeting for 8/18 @ 10:30 *Mother* at New Hope Elementary, which according to your email below is the next available time for the team to meet. I feel that regardless as to if we come to some type of agreement, it is important that we sign and implement [*Student's*] IEP so that he may begin to get services. . . still feel that O shouldn't be penalized for the teams' inability to find a suitable and appropriate for him. I do not expect him to take part in the social skills group at P Elementary School but do expect that the county will provide services to him in a private setting and I would like to know, prior to the meeting on the 18<sup>th</sup>, what those services would look like if we were to start them while waiting for mediation.

(Pet Ex 47, p 338).

66. On August 5<sup>th</sup> 2008, *Father* asked *Ms. L.C.*, via email, to confirm that *Ms. L.C.* had received *Father's* July 30<sup>th</sup> email. *Father* offered to send *Ms. L.C.* "an example of a matrix/plan for showing how [*Student's*] goals are going to be met through the 3 hours provided by the county." The evidence at hearing showed that *Father's* request for such a plan would have satisfied her need for an explanation as to why Respondent offered only three hours per week of special education services. (Pet Ex. 47, p.341).

67. On August 12<sup>th</sup>, 2008, *Father* wrote *Ms. L.C.* by email to ask whether *Ms. L.C.* had received them *Father's* July 31st and August 5<sup>th</sup> emails, and noted that "[o]ne of them required a response". (Pet Ex. 47, p.346)

68. On August 14<sup>th</sup> 2008, *Father* wrote *Ms. L.C.*, by email that:

I have now sent three emails, this one including, asking about what the 3 hours of services would look like if we were to put [*Student*] in a private preschool. Please respond to this request as soon as possible.

(Pet Ex. 47 p. 348).

69. On August 14, 2008, *Father* also requested *Ms. L.C.*, via email, provide the credentials of *K.S.*, who signed the IEP form on July 30, 2008 as a special education teacher. *Father* noted that since *K.S.* was a teacher as she “was under the impression that her position in the OCS system was that of a Speech Language Therapist. Is she dual licensed?” (Pet Ex. 47 p. 349).

70. At hearing, *Ms. L.C.* admitted that she deliberately did not respond, in any way, to *Father's* foregoing emails requesting guidance on how Respondent would deliver the offered IEP services to *Student* in a private regular preschool setting. Instead, *Ms. L.C.* acknowledged that her superior, Director *Ms. M.G.*, directed *Ms. L.C.* not to respond to any of *Father's* inquiries. *Ms. M.G.* also directed *Ms. L.C.* not to advise *Father* that she was not going to respond to *Father's* email requests. (Tr. Vol. 6, 1156:25-1159:12 , April 2, 2009 Testimony of *Ms. L.C.*)

71. The evidence established that by sending the foregoing emails, *Father* was hoping to secure services for *Student* in the waning days of August.

72. The preponderance of the evidence established that *Ms. M.G.* was, at all relevant times, Respondent's official with policymaking authority regarding the provision of Exceptional Childrens' services to children in Orange county. At hearing, *Ms. M.G.* confirmed that she directed *Ms. L.C.* not to respond to *Father's* foregoing emails, and not to advise *Father* that *Ms. L.C.* would not respond to *Father's* email requests. (Tr. Vol. 5, 829:18-830:13; 851:14-854:17, April 2, 2009 Testimony of *Ms. M.G.*); (Pet Ex 11 , Audio of Oct. 13, beginning 105:15; 1:10:50) *Ms. M.G.* explained that she was acting on the advice of counsel when she instructed *Ms. L.C.* not to respond to *Father's* emails. She stated:

Q: And let's be clear. Was it you or your attorney who instructed--who gave the instruction not to respond to Mrs. M.'s request or information about getting services provided to *Student* in his private setting? Was that you or was that somebody else?

A: I was acting on advice of the attorney when I---

Q: But aren't you the expert?

A: Yes, I am, but I'm not an attorney.

(Tr. Vol. 5, 89:1-8)

73. At hearing, *Ms. M.G.* confirmed that when someone outside of the IEP team makes determinations, parents are deprived of their right to participate in the IEP. (Tr. Vol. 5, 859:9-860:1)

74. By giving *Ms. L.C.* the above instructions, *Ms. M.G.* eliminated and prevented Petitioners *Mother* and *Father* from fully participating in the IEP decision-making process before the beginning of the 2008-09 school year.

75. By letter dated August 14, 2008, Respondent provided Petitioners with a Written Prior Notice indicating that the IEP team had determined the offered placement as appropriate, and explained the basis for that decision. The IEP team denied Petitioners' request for an implementation or instructional plan as such request

exceeded Respondent's special obligations to *Student* and impedes the classroom teacher's ability to seize optimal opportunities to work on *Student's* goals. (Pet Ex 6)

76. On August 22, 2008, *Ms. M.G.* informed Petitioners that *Ms. L.C.* had shared with her, two emails from *Father* requesting information on service delivery and staff qualifications. *Ms. M.G.* explained that the school system was "ready, willing, and able" to serve *Student* pursuant to the IEP. (Pet Ex 7) *Ms. M.G.* also stated:

At this time, there is no indication that a private preschool placement is warranted via the decision reached by the IEP team on July 30, 2008.

(Pet Ex 7). This letter proved that Respondent had notice that Petitioners planned to enroll *Student* in a private preschool placement.

77. By letter dated September 10, 2008, *Father* clarified that *Ms. L.C.* had never responded to *Father's* five emails between July 30, 2008 and August 14, 2008 in which Petitioners asked *Ms. L.C.* to provide information how Respondent would meet *Student's* IEP goals in a private setting with three hours a week of special education services. *Father* advised *Ms. M.G.* that she had already informed *Ms. L.C.* that Petitioners did not expect *Student* to participate in the P Elementary School playgroup. *Father* restated that they had enrolled *Student* in a private preschool, and understood that Respondent was denying *Student* services in this private setting. *Father* further noted that "we have never agreed with the decision by the IEP team to limit *Student's* services to those offered in the playgroup settings at P Elementary School." (Pet Ex 8)

78. *Father* did not allow *Student* to participate in the offered placement as part of the IEP, because "we made it clear that *Student* would not be participating in the play group, because he would be going to a preschool classroom five days a week." (Resp Ex 256, p. 104)

79. The July 30 IEP Team meeting was the last meeting before Petitioners enrolled *Student* in the private placement for which Petitioners seek reimbursement and, as such, was the appropriate IEP meeting to give verbal notice under 34 C.F.R. § 300.149(d)(1)(i).

80. A preponderance of the evidence established that Petitioners reasonably notified Respondent they were enrolling *Student* in private school at the end of the July 30, 2008 IEP meeting, and in *Father's* subsequent emails. Petitioners also acted reasonably in enrolling *Student* in preschool after *Ms. L.C.* failed to respond to *Father's* email requests for information.

81. In light of the foregoing, Petitioners complied with the IDEA's notice requirements under 34 C.F.R. § 300.149(d)(1)(ii) before enrolling *Student* in the private placement for which they seek reimbursement.

82. In light of the foregoing, Petitioners proved by a preponderance of the evidence that Respondent's failure to implement *Student's* IEP for the first 10 weeks of the 2008-2009 school year deprived *Student* of his right to a free appropriate public

education by depriving *Student* of the educational benefit he may have obtained from receiving special education services described in his IEP.

83. In a progress note dated August 21, 2008, Ms. Fouts, *Student's* private speech therapist noted that *Student* has made "tremendous" progress in his language development in the past 6-8 months. She explained:

[*Student*]'s ability, however, to use these skills functionally in the rapid back-and-forth of conversation with adults, and particularly with his peers, is markedly impaired in contrast to his basic language skills.

(Pet Ex 19) Fouts opined that *Student*:

will need focused and intensive support in facilitating interactions with his peers, as his ability to use his language skills with his peers is significantly more impaired than his overall language skills would suggest. Work in dyads (play with one other child) and intensive support in the preschool classroom to support *Student's* language and play skills is strongly recommended.

(Pet Ex 19)

84. On August 27, 2008, K.S. tested *Student's* receptive and expressive language. (Pet Ex 63). Based on *Student's* expressive and receptive language skills scores, Respondent determined that *Student* has a mild articulation disorder, i.e. approximately five percent less intelligible than was age-appropriate. (Pet Ex 5, p. 3)

85. On September 4, 2008, *Student's* private autism consultant, Dottie Hoyle, noted that "*Student* clearly participates at least as much if not more than 99% of the other children. He has more language, attends to the teacher's (sic) better, and follows directions most of the time." (Pet Ex 69, p. 557) However, Hoyle also elucidated that, "I am behind him all the time, quietly either repeating what the teacher said or explaining it in a different way." (Pet Ex 69, p. 557)

86. In September 2008, B.R., *Student's* teacher in the social skills playgroup at TEACCH, observed *Student* in his private preschool setting September 2008, without Dorothy Hoyle being present. She was actually "very impressed with his coping skills most of the day." (Pet Ex 40, p. 181) B.R. also noted that, after an outburst, *Student* "recovered quickly. Like many other times when I have seen him. When he is flexible, he is SOOO flexible and when he is rigid boy is he rigid." (Pet Ex 40, p. 181)

#### October 13, 2008 IEP Meeting

87. On October 13, 2008, the IEP team met and amended *Student's* IEP, finding *Student* eligible for speech services and including speech therapy for the articulation disorder. The IEP team decided to provide *Student* with thirty minutes per week of speech therapy to implement *Student's* speech goal. This meeting was

recorded, and the recordation stands as the best evidence of what happened at that meeting. (Pet Ex 11).

88. During this meeting, *Ms. L.C.* again explained that Respondent was offering special education services through the P Elementary School playgroup, two times a week at 90 minutes per session. Petitioners again disagreed with Respondent's offer of provision of special education services to *Student* as they were "grossly inappropriate."

89. The recordings of the October 13, 2008 IEP meeting revealed that *Ms. L.C.* incorrectly concluded that *Mother* and *Father's* decision not to sign, or otherwise endorse Respondent's IEP at the July 30, 2008 meeting, operated as their refusal to consent to implement the services Respondent offered in the IEP. (Pet Ex.11, Audio of October 13, 2008 at 1:06; Tr. Vol. 6, 1165:5-1166:22, April 2, 2009 Testimony of *Ms. L.C.*)

90. *Ms. L.C.*' inference is not supported by either the statements made by *Student's* parents during the July 30<sup>th</sup> meeting or by the law.

a. First, Respondent's evidence fails to show that *Student's* parents refused to consent to Respondent providing the services offered in the IEP to *Student*. During the October 13, 2008 IEP meeting, *Ms. M.G.* advised that *Ms. L.C.* was incorrect in saying that, Petitioner had refused to consent to Respondent's provision of services. At the administrative hearing, Respondent's IEP team members admitted *Student's* parents did not refuse to consent to serve *Student* as they were not given the DEC 6 until October 13, 2008. (Tr. Vol. 5 854:14-856:8, Testimony of *Ms. M.G.*)

b. Second, North Carolina's implementing regulations preclude *Ms. L.C.*' above-noted inference. NC Policies Governing Children with Disabilities § 1503-1(b)(1) impose a duty upon the LEA to obtain informed consent of parents prior to initiation of services. NC Policies Governing Children with Disabilities § 1503-1(b)(2) provide that, "[t]he LEA must make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services to the child.

91. During the October 13, 2008 IEP meeting, *Father* explained that since September 2008, *Student* had been attending private preschool at *OPH* in Carrboro, NC. *OPH* Preschool 2008-09 Policy Manual noted that the school is located just west of Carrboro and loosely follows the calendar of the Chapel Hill-Carrboro City schools. (Resp Ex 225, p. 2)

a. Petitioners' private placement was in a regular education preschool setting consisting of 12-14 preschoolers, ages 3 to 4 years old. *Student* was the only student in his class who had been identified as a child with a disability under the IDEA. (Tr. Vol. 4 649:6-16, Testimony of Sadie Bauer).

b. *Student's* educational plan at *OPH* preschool consisted of *Student* attending preschool five days a week from 8:45 until 12:30 pm., *Student* received six hours a week of special education therapy during preschool, with a focus on behavior

modification from Dottie Hoyle. *Student* also received one hour of speech and language therapy, and one hour of occupational therapy a week.

92. After discussing *Student's* private preschool, Respondent rejected Petitioners' request that Respondent provide special education services to *Student* at the location of *Student's* private preschool. Respondent's rejection was based on their incorrect assumption that *OPH* was not located within the Orange County School district boundaries.

93. During this meeting, *Ms. M.G.* provided Petitioners with the DEC 6 form. Petitioners' did not sign the consent for services DEC 6 form, because they first wanted to consult with their attorney.

94. On October 16, 2008, Petitioners signed the DEC 6, and consented to Respondent providing special education services to *Student*. However, they noted on the DEC 6 that they "[d]isagree with the services currently being offered as we find them insufficient, inadequate, and not comprehensive enough to aid in his development." (Pet Ex 12).

95. In an email to *Ms. L.C.*, Petitioners requested *Ms. L.C.* confirm receipt of the signed DEC 6 and additional language included. *Father* also provided confirmation to *Ms. L.C.* that *OPH*, *Student's* private preschool, was located within the boundaries of Respondent's school district. *Father* informed *Ms. L.C.* that they would like special education and related services to begin as soon as possible at *OPH* preschool. (Pet Ex 43, p. 193).

96. By email on October 23, 2008, *Ms. L.C.* advised *Father* that Respondent's Autism Facilitator, *Ms. W.G.*, would begin providing special education services for *Student* on Tuesday, October 28, 2008. (Pet Ex 43, p. 192).

97. On October 24, 2008, *Ms. Fouts*, *Student's* private occupational therapist, completed an addendum to her earlier speech language evaluation of *Student*. In that addendum, *Fouts* opined that based on her recent observation of *Student*, *Student* still had not reached seven developmental language milestones or skills that children 24 to 36 months of age are expected to reach. These individual skills are critical to be a competent communicator. She further opined, that in combination, *Student's* difficulty with each of these skills makes *Student's* communicating with his peers:

more challenging than would be expected for a child his age. *Student* will benefit from focused and intensive work in dyad and group settings to address these needs and increase *Student's* ability to interact with and learn from his peers.

(Pet Ex 35)

98. On October 24, 2008, Respondent's *Ms. W.G.* contacted *Father* by email to schedule when she would provide special education services to *Student*.



99. Ms. W.G.'s email was the first contact Respondent's autism consultant had with Petitioners since Respondent first learned that *Student* had a mild autism disorder diagnosis in May 2008. Respondent had not included Ms. W.G. in any of the prior IEP meetings or discussions with Petitioners about *Student's* special education.

100. On October 29, 2008, Ms. W.G. began providing special education services to *Student* at OPH for three hours per week. (Pet Ex 43, p. 194 and p. 197)

101. After Respondent began providing services, Dottie Hoyle decreased her special education/behavioral modification services to *Student* to four hours a week. Hoyle's services, combined with special education services by Griffin, meant that *Student* received seven hours total of special education per week, all in his typical preschool. The parents continued to pay for private related services, and supplemented the related services provided by Respondent with another hour of occupational therapy, and 30 minutes of speech and language solely focused on articulation.

102. On December 22, 2008, Ms. W.G. noted that *Student* made "excellent progress" on nine of his short-term objectives; "some progress" on one of his short-term objectives, "mastery" on seven of *Student's* short-term objectives (with one continued for generalization), and *Student* had not yet covered one short-term objective. (Pet Ex 33, Griffin's progress note)

103. At hearing, *Student's* private autism consultant, Dottie Hoyle, agreed with much of Ms. W.G.'s December 22, 2008 progress note. However, Hoyle disagreed that *Student* had "mastered" some areas noted by Griffin. Hoyle opined *Student* continued to need support in the areas of (1) verbal prompting, and (2) creating the environment so these interactions will occur. (Pet Ex 34)

#### **IV. APPROPRIATENESS OF SERVICES**

101. Based upon witnesses' testimony with expertise in early intervention with children on the autism spectrum and documentary evidence, early intervention is a critical factor in outcomes for children on the spectrum. (Testimony of Dr. Umbel, Dr. Naftel, Ms. Palmer, Ms. Hoyle, and Dr. S.F.).

102. Playgroups are a commonly accepted method of teaching skills to students with autism. (WG, Tr. Vol. 8, p. 1416, lines 9-17) Recent research supports autistic students making progress from using playgroups for three hours per week. (WG, Tr. Vol. 8, p. 1454, lines 23-25, and p. 1455, lines 1-21)

103. Petitioners' research noted that many programs for working with autistic students have very low teacher/student ratios and involve transition from a small, highly structured group to an integrated classroom. (Pet Ex 54, pp. 2-3) Petitioners' research further noted that a strategy for engaging the child in classroom activities provides a "highly structured classroom environment, thereby preventing behavior problems by increasing the children's understanding of classroom routine and specific activities and by promoting the children's independence and success." (Pet Ex 54, p. 12) In

September 2008, *Student's* private autism consultant recommended a student/teacher ratio of 1:5. (Pet Ex 69, p. 568)

104. At hearing, Respondent implied that *Student's* speech language delays may have been due to *Student's* bilingual environment in Argentina. (Resp Ex 256, pp. 121-124) Dr. Umbel advised *Father* that the way *Student* learns is better suited to an "English-speaking environment." (Resp Ex 256, pp. 124-125) However, when Respondent questioned Dr. Umbel at hearing, Dr. Umbel rejected the theory that *Student's* speech language delays were caused by his exposure to a bilingual environment at St. John's school. Dr. Umbel opined that *Student's* hyperlexia and vocabulary strengths rule out a bilingual environment as being a significant cause of *Student's* speech and language delays and impairments. Id. Dr. Umbel explained that the literature in these areas show that:

where these children suffer is in the area of vocabulary, and that's exactly where *Student* is excelling. There were--that was exactly where *Student* excelled when he was--when I tested him.

Tr p 123. Dr. Umbel concluded *Student's* bilingual background would account for a "very, very small, if at all--a very small percent of the variance in his language development." Tr p 123.

103. Apart from one unsubstantiated suggestion offered by Ms. Tyberg, Respondent offered no evidence rebutting Dr. Umbel's clear opinion that *Student's* delays and impairments were not caused by *Student's* exposure to a bilingual environment, or to rebut the rationale Dr. Umbel articulated to support her opinion. Therefore, the Court finds that the etiology of *Student's* delays and impairments is what Dr. Umbel and Dr. Naftel both identified in their reports and reiterated in her testimony: *Student's* Autism.

104. DPI's article of Best Practices in Educating Children with Autism identifies research-based practices to "serve as a framework for the training of teachers" who teach students with Autism Spectrum Disorder. In that document, DPI stated:

research suggests that providing 25 hours a week of intensive instruction on measurable objectives identified with the educational program is as effective as providing 40 hours of 1:1 instruction.

(Pet Ex 36) Contrary to how Ms. Palmer interpreted this document, the undersigned finds that DPI did not recommend 25 hours of intensive instruction a week for students with ASD in this document.

105. Respondent heavily relied on the May and June 2008 observations by *K.S.*, *K.T.*, and Tyberg, to support their position that *Student* did not require a significant level of specialized instruction and related services to meet *Student's* needs, and their proposed placement was the least restrictive environment.

106. Most notable was the hearing testimony of Respondent's IEP team members. Every member of *Student's* IEP team for Respondent opined, in nearly

identical words, that they did not believe *Student* required significant specialized instruction and related services, because *Student* was “bright,” and exhibited very little difficulty at all during the two 90-minute sessions at P Elementary School playgroup in May and June 2008.

107. Dr. S.F. was Respondent’s only expert witness who was not employed by Respondent. During direct-examination, Dr. S.F. opined that Respondent’s proposed IEP placement and services were appropriate based on the same considerations invoked by Respondent’s IEP Team members, i.e., that *Student* was “very bright” and demonstrated little difficulty during Respondent’s two 90-minute observations of *Student* participating in the P Elementary School Playgroup. Dr. S.F. acknowledged that she specifically relied on the reports of Dr. Umbel’s evaluation and the Respondent’s two 90-minute observations of *Student*.

108. However, on cross-examination, Dr. S.F. admitted that the basis of her opinion was limited to her review of the documents and materials Respondent provided to her. Dr. S.F. never reviewed, and thus, never considered any of the recent evaluations of *Student*, recent progress notes by *Student*’s providers, or Petitioners’ experts’ opinions in forming her opinions. Without hearing both sides of these issues, Dr. S.F. was prevented from being able to assess completely and properly, the appropriateness of Respondent’s proposed IEP placement and services as the law requires.

109. Dr. S.F. acknowledged that she had never worked with *Student* or observed him in any setting, including an educational one. Dr. S.F. had advised Respondent that she was willing to observe *Student*, but Respondent declined her invitation.

110. Also on cross-examination, Dr. S.F. explained how she, Lee Marcus, and Susan Robinson co-authored a chapter in an important treatise entitled *Psychological and Developmental Assessment of Children with Disabilities*. Dr. S.F.’s chapter was devoted to the evaluation, assessment, and testing of children with autism. Specifically, the chapter Dr. S.F. authored was devoted exclusively to the testing and evaluation of children on the autism spectrum.

a. Dr. S.F.’s chapter opened with a discussion of a child she called “Tommy.” Dr. S.F. agreed that the purpose of the chapter’s discussion of “Tommy” was to highlight one a recurring problem schools face in evaluating children who are on the “high functioning” end of the autism spectrum. Tommy was extremely bright, and his very high cognitive abilities masked the very serious features of Tommy’s autism.

b. Through their focused discussion of “Tommy,” Dr. S.F. and her co-authors noted the frequent failure of educators to assess accurately the existence and severity of autistic symptoms in children who are high functioning.

111. Dr. S.F. confirmed that, in her opinion, *Student* was very much like “Tommy” as he too, was “extremely bright” and a high-functioning child on the autism spectrum. Specifically, Dr. S.F. opined that the difficulties experienced by a highly intelligent child with Autism, like *Student*, are not likely to be observed, much less

assessed, if a child like Tommy is observed for only a brief interval, in one setting. (Tr. Vol 6, 1067:25-1076:8)

112. Further, in practice, the challenges of accurately assessing the educational needs of high-functioning autistic children is compounded when the brief observations are conducted in a “structured environment.” Dr. S.F. confirmed that the P Elementary School playgroup where *Student* was observed, qualified as such a “structured environment.”

113. Dr. S.F. further noted that “comprehensive observations” conducted in varied and unstructured situations are required to assess properly the areas of need for high-functioning autistic children like “Tommy” and *Student*. Such observations “may pinpoint the areas of difficulty that affect the child's performance.” (Tr. 1075:17-19). “Quick observations” were not only inadequate tools for assessing the needs of a high-functioning autistic child like *Student*, they were often counter-productive, because the evaluation design will often mask the characteristics (or existence) of a high-functioning child's autistic characteristics. (*Id.* at 1076:1-8).

114. Based on such testimony, Dr. S.F. undermined the IEP team members' uniform testimony regarding the basis for the decision to offer *Student* 3 hours per week of special education services.

115. The preponderance of the evidence, as described in the above Findings of Fact, showed that Respondent failed to justify sufficiently the IEP's recommendation to provide the three hours of special education to *Student* at the P Elementary School playgroup. By failing to sufficiently explain how and why it determined three hours of special education services per week would meet *Student's* needs, Respondent failed to provide *Student* with special education services that were reasonably calculated to enable *Student* to receive individualized educational benefits. By failing to identify the specifics of the proposed playgroup, Respondent denied *Student* special education services as his IEP was not reasonably calculated to enable *Student* to received individualized educational benefits.

116. The evidence at hearing showed that showed that *Student* made very good progress with six hours per week of special education. (*Father*, Tr. Vol. 3, p. 352, lines 2-5)

117. In her November 17, 2008 progress note, Dottie Hoyle explained:

Through consistent intervention, [*Student*]'s progress in the last four months in several skill areas has been remarkable. The steady involvement and commitment of *Student's* family member has been critical to his overall progress.

(Pet Exh 6; DH, Tr. Vol. 3, p. 503, lines 21-25 and p. 504, lines 1-2) Despite noting that *Student* had made “remarkable” progress in four months while receiving six hours per week of special education, Ms. Hoyle recommended a minimum of ten hours per week of special education. (Pet Ex 16, p. 6) That opinion is based Hoyle’s belief that *Student* needs Applied Behavior Analysis (ABA). (DH, Tr. Vol. 3, p. 500, lines 10-12) During later testimony, Ms. Hoyle admitted that *Student* would benefit from seven hours of special education. (DH, Tr. Vol. 3, p. 501, lines 20-23)

118. At hearing, Casey Palmer acknowledged that she told Petitioners that 10 hours of instruction was appropriate, although Ms. Palmer never suggested to the IEP team that 10 hours of instruction was appropriate. (CP, Tr. Vol. 4, p. 753, lines 16-18, p. 756, lines 10-16 and 24-25, p. 757, lines 1-2)

119. The preponderance of the evidence showed that *Student’s* IEP was not appropriate with regard to occupational therapy goals when it was written in July 2008. (Tr. Vol. 6, p. 1021, lines 4-7)

#### **IV. LEAST RESTRICTIVE ENVIRONMENT**

120. Respondent argued that given Petitioners’ own research, and expert evidence, *OPH* preschool was not the appropriate placement or the least restrictive environment for *Student* to receive special education services.

121. Respondent presented evidence that *Student’s* classroom in the morning is “unstructured,” “chaotic” with “lots of kids” and “lots of activities all over the place,” (Tr. Vol. 6, p. 1008, lines 23-25, and p. 1014, lines 18-23) and not a language-intensive environment. (Tr. Vol. 8, p. 1458, lines 2-8)

122. *Father* agreed that *Student’s* private preschool class at *OPH* “may lack some structure.” (Resp Ex 256, p 151) *B.R.* from TEACCH agreed with *Father’s* characterization of *Student’s* *OPH* class as “loosey goosey.” (Pet Ex 40, p. 181) At the October 13, 2008 IEP meeting, Casey Palmer opined that the preschool in which *Student* was enrolled was not the best choice for *Student* because there was “not a lot of structure.” (Pet Ex 72, p. 2) Further Dottie Hoyle opined that were “not a lot of models for *Student*” in his private preschool class. (Pet Exh 69, p. 557)

123. During the summer of 2008, neither of *Student’s* parents worked, and therefore, they were able to work, along with other services providers, with *Student*. This contributed heavily to *Student’s* remarkable progress over the summer and fall. (Pet Ex 9-Audio of July 10, Starting at 8-12)

124. Nevertheless, the most convincing evidence regarding the appropriateness of placement for *Student* to receive his special education services came from Dr. Naftel. Dr. Naftel was originally identified by Respondents as their expert witness on *Student’s* diagnosis and the appropriateness of Respondent’s educational plan. Respondent had demanded, by way of a counterclaim, that Petitioners allow Dr. Naftel to conduct comprehensive psycho-educational testing on *Student*. On the first day of hearing, Petitioners consented to the evaluation. (Tr Vol. 1, 20:19-25:6).

125. On February 10 and 13, 2009, Petitioners presented *Student* for testing by Dr. Naftel. (Pet Exs. 74, 75). *Student's* parents retained no decision-making authority over who conducted the tests or what tests were conducted by Respondent. Respondent retained the CDL and its designated expert, Dr. Naftel, to conduct the testing on *Student*.

126. Based upon her comprehensive evaluation of *Student*, Dr. Naftel issued a full report of her findings and recommendations, (Pet Ex. 74). In her report, Dr. Naftel found:

*Student* continues to be diagnosed with high-functioning autism.

A regular education classroom is likely the most appropriate least restrictive environment for him at this time.

*Student* struggles with play skills, peer interactions, flexibility, and self-help skills. Thus, within the regular education classroom, *Student* will likely benefit from and require special education services to function appropriately in this setting."

Specifically, a special educator may be helpful in modifying tasks so that they are geared to his learning style (such as presenting tasks in a visual rather than auditory format), provide him with individualized instruction, provide strategies/accommodations to assist with behavioral issues that may impede learning, and help facilitate peer interactions and play skills.

Based on information from his family, public educators, and private educators, '[*Student*]' currently seems to be making appropriate progress towards his IEP goals. Thus, the present level of services seems adequate in regard to meeting [*Student's*] educational needs at this time.'

*Student* benefitted from the use of a schedule during the evaluation to let him know what to expect. Thus, a schedule with pictures and simple words is recommended for use with [*Student*] at home and at school.

It is recommended that [*Student*] work in several shorter work sessions interspersed with brief breaks, rather than one long work session to increase his ability to stay on task.

When teaching, it will be important to incorporate challenging items with easier items to prevent [*Student*] from shutting down. A social story that emphasizes that it is okay to make mistakes and take guesses may also be helpful to [*Student*].

(Pet Exs. 74, 75 (various excerpts))

127. After receiving Dr. Naftel's report, Respondent abandoned Dr. Naftel as their designated expert on autism and the education of children with autism. *Student's* parents offered Dr. Naftel as their expert witness.

128. Based upon the testing she conducted at the CDL, Dr. Naftel concluded that *Student* had made significant progress under the Petitioners' educational plan at *OPH* preschool. (Tr. Vol. 2, 244:17-22 (March 23, 2009 Testimony of Dr. Naftel; Id., 247:5-8; Pet Ex 74, p. 16). She noted in her report:

*Student* . currently seems to be making appropriate progress towards his IEP goals. Thus, the present level of services seems adequate in regard to meeting *Student's* educational needs at this time.

(Pet Ex 74 p 16)

129. In February and March 2009, Ms. E.K. conducted an annual occupational therapy reevaluation of *Student*. *Student's* results showed significant improvements on *Student's* fine motor skills by scoring in the average range. *Student* continued to show difficulty integrating and applying skills over different settings and under different circumstances. As a result, Ms. E.K. recommended weekly occupational therapy working on eight listed objectives. (Pet Ex 76)

130. On March 9 and 11, 2009, Respondent's occupational therapist also conducted a reevaluation of *Student's* occupational skills. Ms. Alguire found *Student's* fine motor skills were in the average range, while *Student's* sensory processing skills were in the typical performance range in most areas. She also found, like Ms. E.K., that *Student's* participation in a learning environment is influenced by his high sensitivity to sensory stimuli, and changes in routines. Alguire recommended that the IEP team consider how:

best to provide necessary supports to *Student* to target strategies that would support *Student's* ability to participate in routinely in activities and better self-modulate his behavioral responses; occupational therapy may appropriately serve in this role.

(Pet Ex 77)

131. The 2009 evaluations of *Student* corroborated Petitioner's argument that the preschool setting at *OPH* was an appropriate placement for *Student* with the necessary supports, and showed that *Student* progressed on his IEP goals in that setting.

## **V. REIMBURSEMENT**

132. When *Student* enrolled at *OPH*, he was three years old. According to the *OPH* Preschool 2008-09 Policy Manual, *Student* could have attended three days a week and continued doing so when he turned four. (Resp Ex 225, p. 15)

133. *Student's* schedule changed several times while at the private preschool. After the trial period beginning in September 2008, and until October, *Student* arrived at the private preschool at "around 9:45" on Mondays due to private speech therapy on Monday mornings. (Resp Ex 206, Resp Ex 208) In October, when *Student* began attending group speech therapy, he began arriving to school on time on Mondays, but was removed from school early on Thursdays. (Resp Ex 208) Other than these time changes, *Student* attended preschool Mondays through Fridays, from 8:45 until 12:30 pm.

134. In late October 2008, *Student's* attendance at extended care in *OPH* began because of *Father's* taking a job. (Resp Ex 155) Extended care lasted from 12:45 pm until 3:30.

135. The cost of the 5-day morning program at *OPH* preschool is \$590 per month, plus \$25.00 application fee, and \$ 250.00 enrollment and supply fee. The *OPH* Preschool invoice does not reflect less than a five (5) day attendance by *Student*. (Pet Ex 81, p. 1)

136. Petitioners paid New Hope ASD Consulting the following amounts for special education services: \$1965.00 for July 2008, \$1100.00 for August 2008, \$1330.00 for September 2008, \$1492.50 for September 2008, \$750.00 for November 2008, \$550.00 for December 2008, \$980.00 for January 2009, \$795.00 for February 2009, and \$495.00 for March 2009. The invoice from New Hope ASD Consulting contains entries related to IEP meeting planning or attendance on July 21, 22, and 30, 2008 totaling \$680. (Pet Ex 81, p. 12) October's invoice includes \$120.00 billed for participation in an IEP meeting. Petitioners submitted a breakdown of New Hope ASD Consulting for February 2009 services for \$795 for twelve hours billed at \$55/hour and 1 hour billed at \$80 per hour. The "Total" on this breakdown is inaccurate and should be \$740. (Pet Ex 81, p. 13)

137. Any inconsistency in the dates between the invoices from New Hope ASD Consulting for services and the actual dates of service in Ms. Palmers' notes does not affect the total amount of services provided. (Pet Ex 81, pp. 4, 12, and Pet Ex 70, pp. 2, 3) According to *Father*, the parents were not asking the Orange County Schools to provide one-on-one verbal behavioral therapy during the summer. (Resp Ex 256, p. 59)

138. Petitioners submitted an invoice for services rendered by Triangle Therapy, the private occupational therapists, from April 2008 through March 2009 for \$2434.00. (Pet Ex 81, p. 14) Petitioners submitted an invoice from Emerge, the private speech therapists for *Student*, for services rendered from June 24, 2008 through March 19, 2009 for \$3,655. (Pet Ex 81, pp. 15-16) In the invoice from Emerge, \$1,020 is for services rendered before the beginning of the Orange County Schools school year on August 25, 2008. (Pet Ex 81, p. 15)



139. TEACCH did not assess any fees because of their intake services (Resp Ex 209).

### **CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has jurisdiction of this contested case pursuant to Chapters 115C and 150B of the North Carolina General Statutes.

2. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, is the federal statute governing education of students with disabilities. The federal regulations promulgated under the IDEA are codified at 34 C.F.R. Parts 300 and 301. The controlling State law for students with disabilities is N.C. Gen. Stat. Section 115C, Article 9 and the corresponding State regulations including the North Carolina Department of Public Instruction Procedures Governing Programs and Services for Students With Special Needs Sections.

3. The IDEA requires local education agencies (“LEAs”) to evaluate and identify students eligible for services under IDEA. 20 U.S.C. § 1412(a)(3)(A). The Caldwell County Public School System is an LEA subject to the requirements of IDEA.

4. The standard for assessing the substantive adequacy of a free and appropriate public education (FAPE) under the IDEA is whether the individualized educational program (IEP) is “reasonably calculated to enable the child to receive educational benefits.” Board of Education v. Rowley, 458 U.S. 176, 206-07 (1982). See, also, A.B. v. Lawson, 354 F.3d 315, 319 (4<sup>th</sup> Cir. 2004) (“the FAPE must only be ‘calculated to confer some educational benefit on a disabled child.’”)

5. A disabled child is to be mainstreamed to the maximum extent “appropriate.” 42 U.S.C. §1412(a)(5)(A). Congress did not require that school districts maximize each disabled child’s potential commensurate with the opportunity provided other children. Rowley, 458 U.S. at 198. See also, Cone v. Randolph County Schools, 302 F.Supp.2d 500, 509 (M.D.N.C. 2004) (the Rowley standard is “relatively modest,” and does “not require a school district to maximize a handicapped child’s potential, but merely mandates that the IEP provide some educational benefits”). See also, A.B. v. Lawson, 354 F.3d 315, 330 (4<sup>th</sup> Cir. 2004) (although a child was thriving in private school, “IDEA’s FAPE standards are far more modest than to require that a child excel or thrive”).

6. N.C. Gen. Stat. §115C-109.6(F) provides that “the decision of the administrative law judge shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.”

7. An IEP team’s determination that a less restrictive placement would not be appropriate is entitled to substantial deference. Hartmann v. Loudoun County Board of Education, 118 F.3d 996, 1005 (4<sup>th</sup> Cir. 1997); School District of Wisconsin Dells v. Z.S. by Littlegeorge, 295 F.3d 671, 677 (7<sup>th</sup> Cir. 2002); Briggs v. Board of Education of State of Conn., 882 F.2d 688, 693 (2<sup>nd</sup> Cir. 1989); Lachman v. Illinois State Board of Education, 852 F.2d 290, 297 (7<sup>th</sup> Cir. 1988).

8. School systems are to provide FAPE in the least restrictive environment (LRE). 42 U.S.C. §1412(a)(5). The LRE provisions apply not only to grades K-12, but also to preschool children with a disability. 34 C.F.R. §300.116. Public schools without general preschool programs for nondisabled children may meet LRE requirements by various alternative methods, including access to Head Start programs with nondisabled children. Letter to Cleary, 211 IDELR 347A (OSEP 1984):

9. In the absence of public preschool programs for nonhandicapped children, there are a number of ways an SEA or LEA could meet the LRE requirements, such as linking the preschool handicapped programs to preschool programs for nonhandicapped children operated by other public agencies (such as Head Start), or by locating preschool handicapped programs in regular elementary school buildings. See also, Roane County School System, 45 IDELR 173 (SEA TN 2006) (alternative methods by which public agencies that do not operate programs for nondisabled preschool children may meet the LRE requirements include “(1) providing opportunities for participation (even part-time) of pre-school children with disabilities in other pre-school programs operated by public agencies (such as Head Start)...”).

10. School districts have discretion to determine what educational methodology or methodologies to employ as long as the choice provides FAPE. Lachman v. Illinois State Board of Education, 852 F.2d 290 (7<sup>th</sup> Cir. 1988) (“Rowley and its progeny leave no doubt that parents, no matter how well motivated, do not have a right under the EAHCA to compel a school district to provide a specific program or employ a specific methodology in providing for the education for their handicapped child.”).

11. A preponderance of the evidence showed that Respondent deprived *Student* his right to a FAPE by failing to implement “substantial and significant elements” of his IEP. Petitioners claim that, from July 31, 2008 through October 28, 2008, the County denied *Student* a FAPE because the County failed to implement “substantial and significant” elements of *Student’s* IEP. Petitioners are correct.

12. To prevail on a “failure to implement” claim, a petitioner must show that the school district failed to implement “substantial or significant provisions” of the IEP. Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5<sup>th</sup> Cir.2000). It is not enough for a petitioner “to show a mere *de minimis* failure to implement some minor provision of an IEP.” *Id.* Instead, a petitioner must establish that the failure to implement some element of a child’s IEP caused the deprivation of “a meaningful educational benefit.” *Id.*

13. The failure to implement theory of liability under the IDEA is grounded in the Act’s requirement that the LEA be accountable for “confer[ring] some educational benefit upon the handicapped child.” *T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3<sup>rd</sup> Cir.2000) (citing *Rowley*, 458 U.S. at 188-89, 102 S.Ct. 3034). It is therefore axiomatic that, when an LEA offers an IEP and calls it a FAPE, the Agency’s complete failure or refusal to implement any educational service prescribed by the IEP constitutes a denial of FAPE. See, e.g., *District of Columbia v. Ramirez*, 377 F.Supp.2d 63, 69 (D.D.C.,2005) (holding LEA’s failure to provide transportation aide to a

disabled child who could not board the LEA's offered transportation without an aide constituted a failure to implement "substantial and significant" provisions of the child's IEP, and, as such, the LEA denied FAPE).

14. Petitioners have established by a preponderance of the evidence that the County failed to implement "substantial or significant" provisions of *Student's* IEP, beginning on the first day of classes in the 2008-09 school year until Respondent began providing services on October 28, 2008. During that period, *Student's* IEP called for specific specialized instruction and related services to be provided to *Student*, including occupational therapy and specialized instruction to enable *Student* to meet his IEP goals and objectives. (Pet Ex 1).

15. Respondent's witnesses acknowledged that the County was required to provide *Student* with the services identified in *Student's* IEP. See, e.g., (Tr., Vol. 7, 1211:15-1214:12 (testimony of Ms. L.C.)). Respondent's witnesses also acknowledged that Respondent failed to implement the services from *Student's* IEP until October 28, 2008, when the County directed its personnel to deliver the services to *Student* where he was enrolled at Playhouse. (Tr. Vol. 5, 853:24-854:5 (March 27, 2009) (Testimony of Ms. M.G.); Id., Vol. 6 1163:9-12 (April 2, 2009) (testimony Ms. L.C.)).

16. The law is plain that the LEA is obliged to utilize best efforts to obtain parents written consent or written refusal to consent to the provision of services. See, Ex. P 79 p. 1 (The Handbook on Parent's Rights); 20 U.S.C.A. 1414(a)(1)(D); CFR \_34 §300.300(b)(2); see also, NC Policies Governing Children with Disabilities § 1503-1(b). This obligation is not discharged by the parent's disagreement viz. the sufficiency of the services offered. See, *id.*

17. Respondent's witnesses did not claim that the services prescribed in *Student's* IEP were not necessary to providing *Student* with a FAPE. See, generally, Tr. Vol. 5-8 (testimony of Respondent's witnesses). Nor do they dispute that the services prescribed by *Student's* IEP were required in order to provide *Student* with a FAPE. After all, both the July 30 and October 13 IEPs were the LEA's educational plan. (Tr. Vol., 6 1146:14:-1147:2 (April 2, 2009) (Testimony of Ms. L.C.)).

18. The IDEA (and North Carolina's statutes and enabling regulations) clearly imposes an obligation on the LEA to exercise reasonable efforts to obtain in writing either the parents' consent or their affirmative refusal to consent to the LEA's delivery of services to their child. 20 U.S.C.A. 1414(a)(1)(D); 34 CFR 300.300; NC Policies Governing Children with Disabilities.

19. North Carolina facilitates the discharge of this obligation by way of a state form designed for the purpose: the NCDPI's Form DEC 6. (Pet Ex. 4). The DEC 6 contains two options for parents presented with it: parents may consent to the delivery of services or they may refuse to give consent. In a sequence of 5 emails, *Father* beseeched Ms. L.C., the designated LEA Representative to provide *Father* and *Mother* with some information regarding the logistics of providing the offered IEP services in a private setting and the qualifications of members of the team. (Pet Ex 47, p 338-350). *Father's* emails do not refuse consent, but is a necessary implication of them.

20. A preponderance of the evidence showed that Respondent's IEP deprived *Student* of a FAPE, because it was substantively deficient. To establish a substantive deficiency claim, a petitioner must show that the IEP offered by the LEA is not "reasonably calculated to enable the child to meet the child's needs." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982).

21. Our Circuit has sharply declined repeated invitations by the schools to read the *Rowley* standard as requiring token or nominal academic advancement. See, e.g., *Carter v. Florence County Sch. Dist. Four*, 950 F.2d 156, 160 (4th Cir. 1991), *aff'd*, *Florence County Sch. Dist. Four v. Carter by & Through Carter*, 510 U.S. 7, 11 (1993) (quoting *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985) ("[C]learly, Congress did not intend that a school system could discharge its duty under the Act by providing a program that produces some minimal academic advancement, no matter how trivial."))

22. To determine whether an IEP is reasonably calculated to meet a child's needs, this Circuit's analysis requires the Court to, first, identify the child's educational needs, and, second, determine whether the array of services and placement offered were "reasonably calculated" to meet *Student's* needs.

23. A child's educational needs are to be memorialized in the IEP's "Goals and Objectives" section. In this case, the parents and Respondent worked on and eventually agreed upon the set of goals and objectives memorialized in *Student's* IEP. The Court therefore is not required to resolve any disagreement with respect to the sufficiency of the Goals; the agreed upon goals are memorialized in *Student's* IEP. (Pet Ex 1 and Pet 57).

24. The statements of *Student's* goals and objectives is notable for its focus on *Student's* learning how to successfully engage in a regular classroom routine, to make transitions from activity to activity successfully and without experiencing the extreme frustration, outbursts and meltdowns that marked many of his days at St. John's School.

25. In addition, *Student's* goals and objectives require *Student* to learn to respond appropriately to appropriate, spontaneous activities and interactions with peers. The overriding import of these goals and objectives is that, to make any progress on them at all, *Student* would need to be in a setting that provided a significant number of transitions. The setting would have to include a significant number of peers whose classroom routine he would learn to join, and who would also engage in a significant number of spontaneous (appropriate) interactions and activities. In addition, *Student* would need to be present in that setting on a consistent, "regular" basis. This is the result of so many of *Student's* goals being directed at his impairments and delays in socialization skills and pragmatic language. (Pet Ex 1, Resp Ex 57)

26. In light of these goals and objectives, and in order for *Student* to make any progress at all in developing his peer interaction skills, socialization skills, and pragmatic language skills, *Student* would require specialized instruction and related services designed to (1) extinguish *Student's* maladaptive behaviors, and then (2) replace them with adaptive behaviors. Specifically, to make any progress in that domain requires specialized instruction designed to (1) teach *Student* the adaptive replacement

behaviors and adaptive socialization skills; (2) facilitate *Student's* integration of those behaviors and skills; and then (3) to teach *Student* how to generalize those behaviors and skills across multiple settings and in varied circumstances. As a result, the IEP's statement of *Student's* educational needs demands a significant level of specialized instruction in those areas.

27. In this case, a preponderance of the evidence showed that *Student's* IEP did not provide sufficient provision for the specialized instruction that was necessary to enable *Student* to make progress on those goals. The IEP provides only for two, 90-minute sessions per week with 30 minutes of each session devoted to providing *Student* with Occupational Therapy services intended to enable *Student* to make progress on goals unrelated to the socialization and pragmatic language skills that dominate *Student's* IEP's statement of needs.

28. Petitioners' witnesses offered compelling testimony relating to the insufficiency of the services offered in *Student's* IEP. (Tr. vol. 4, 743:1-746:12 (March 26, 2009 - Palmer); Tr. Vol 3, 514:11-517:3 (March 24, 2009- Hoyle Tr. vol. 4, 590:14-592:10 - Fouts). The Court found the Petitioners' witnesses on this issue to be credible and persuasive. Notably, Hoyle's testimony was persuasive given that she worked with *Student* in the socialization and behavioral domain more than any other professional. While Respondent attempted to rebut Ms. Hoyle's through the testimony of *Ms. W.G.*, Griffin could not refute the fundamental fact that *Student* has "made a lot of progress." (Tr Vol. 8 1485:2-9 (April 6, 2000 - *Ms. W.G.*).

29. The preponderance of the evidence clearly established that Respondent's procedural violations deprived *Student* of educational opportunity and Petitioners *Mother* and *Father* of the right to meaningful participation in developing *Student's* IEP.

30. The IDEA also provides "procedural safeguards to insure the full participation of the parents and proper resolution of substantive disagreements." *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 368, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985) (internal quotation marks omitted). Congress placed every bit as much emphasis on compliance with procedures giving parents .. a large measure of participation at every stage of the administrative process .. as it did upon the measurement of the resulting IEP against a substantive standard." *Rowley*, 458 U.S. at 205-06, 102 S.Ct. 3034. This reflects, as courts have recognized, that "[t]he core of the statute .. is the cooperative process that it establishes between parents and schools." *Schaffer*, 546 U.S. at 53, 126 S.Ct. 528 (citing *Rowley*, 458 U.S. at 205-06, 102 S.Ct. 3034).

31. Procedural violations which result in a "loss of educational opportunity or which "seriously infringe the parents' opportunity to participate in the IEP formulation process clearly result in the denial of a FAPE." *W.G. v. Board of Trustees of Target Range School District No. 23*, 960 F.2d 1479 (9<sup>th</sup> Cir. 1992).

32. The IDEA authorizes hearing officers and courts to award equitable remedies for violations of its procedural requirements where those amount to a deprivation of the right to a free appropriate public education. *Fitzgerald v. Fairfax Co. Sch. Bd.*, 556 F.Supp.2d 543, 552 (E.D.Va.2008). It is clear that the showing of a

procedural violation of the IDEA, standing alone, is not sufficient to show a school failed to provide a child with a FAPE. *Id.* It follows that a "presumably correct finding" concerning a child with a disability will not be overturned simply because the IDEA's procedural requirements were not strictly followed. DiBuo v. Bd. of Educ. of Worcester County, 309 F.3d 184, 190 (4th Cir.2002) (emphasis in original).

33. Thus, in the event that a court finds a procedural violation of the IDEA, the court must then determine what caused a loss or deprivation; specifically, the court must determine whether the procedural violation either (1) resulted in the loss of an educational opportunity for the disabled child, or (2) deprived the child's parents of the right to meaningfully participate in the development of the child's IEP. M.M. ex rel. D.M. v. Sch. Dist. of Greenville County, 303 F.3d 523, 533 (4th Cir.2002); see, 20 U.S.C. §1415(f)(3)(E)(ii); Fitzgerald, 556 F.Supp.2d 543, 552 (quoting Farrin v. Maine Sch. Admin. Dist. No. 59, 165 F.Supp.2d 37, 43-44 (D.Me.2001) ("When the crux of an appeal is a procedural blunder in applying the IDEA, a harmless error standard applies.")).

34. In this case, the factual question was whether Respondent's team members were exercising their own independent thought and judgment in offering and then refusing to modify the July 30 IEP for *Student*, or, on the other hand, whether such team members were essentially following a directive made by someone who did not participate as a member of the IEP Team. It is an issue of the intent and motivations of Respondent's representatives on the IEP Team based on the circumstances established by the evidence.

35. Petitioners first established by a preponderance of the evidence that Respondent improperly delegated the authority to make the final decision with respect to its proposed IEP to an outsider to the IEP Team. Further, in testimony at the hearing, it was revealed that *Ms. M.G.* was the person *Ms. L.C.* was referring to as the putative author of the DEC 5. *Ms. M.G.* is also Respondent's representative who directed *Ms. L.C.* not to respond to *Father's* repeated written requests for information to assist her in coordinating delivery of services to *Student* in a private setting. And, it was *Ms. M.G.* also, who instructed *Ms. L.C.* not to advise *Father* that she had been instructed not to respond. While additional testimony revealed that *Ms. M.G.* herself was subject to instruction by Respondent's counsel, the Court need not resolve that factual issue. Both *Ms. M.G.* and the County's counsel were outsiders to the IEP Team at the time the County's final offer of services was made to Petitioners on July 30, 2008.

36. In the absence of a discussion of the services that *Student* would require to make progress toward his goals, it is difficult to explain how Respondent's team members arrived at the same conclusion (two 90-minute sessions), especially when there is no evidence that any other amount of time was suggested by any of the Respondent's representatives on the IEP Team. Again, the audio recordings are important and reliable evidence for the Court to use in drawing the inference required by this claim.

37. IDEA plainly requires that the determinations of placement and services are solely the province of the members of the IEP Team, and that parents have a right to participate meaningfully in those decisions as members of their child's IEP Team. 34

CFR § 300.501 As such, an LEA may not delegate decision-making authority with respect to a child's placement or services to anyone who is not a member of a child's IEP Team. In doing so here, Respondent violated that procedural requirement of the IDEA. The procedural violation was not a "technical failure" and it was neither trivial nor inconsequential. Because of Respondent's improper delegation of decision making authority over *Student's* services and placement, *Father* and *Mother* were deprived of their right to participate meaningfully in the decision-making process with respect to *Student's* IEP placement and services.

38. Based on the foregoing procedural violations, Petitioners are entitled to the remedies authorized by the IDEA.

39. Having established that Respondent denied *Student* a Free Appropriate Public Education, Petitioners also bear the burden of proving by a preponderance of the evidence that *Student's* private placement was an "appropriate" educational placement.

40. IDEA requires an IEP Team to arrive at such a conclusion deductively, through the process of eliminating less restrictive alternatives on the continuum of educational placements. 34 CFR §300.114- 120. The process is required by the LRE mandate. See, 34 CFR §114 (restating the statutory LRE provisions codified at 20 U.S.C. § 1412(a)(5)(A).

41. In the context of placement decisions, compliance with the LRE mandate typically means that the first question an IEP Team must resolve determining placement for any child with a disability is whether, due to "the nature or severity of a child's disability," educating the child "in regular classes with the use of supplementary aids and services [could] not be achieved satisfactorily." 20 U.S.C.A. § 1412(a)(5)(A). If the child can be satisfactorily educated in a regular education setting with the use of supplementary aids and services, he must be educated in that setting. *Id.*

42. Applying those principles to this case, the Court finds that the IEP Team did not engage in the LRE process described above (or any process resembling it) during any of the IEP meetings. Three of the four IEP meetings at issue are recorded, and the recordings do not contain any evidence of the deductive process by which various placements on the continuum were eliminated pursuant to the LRE standard. To the extent that the process could have occurred in the only unrecorded meeting, Petitioners' witnesses who were present at that meeting unequivocally assert that no such process took place, and none of the County's witnesses testified to the contrary, and the minutes of that meeting do not memorialize such a process having taken place.

43. At the time the IEP was decided, the evidence showed that *Student* could be satisfactorily educated in a regular education setting with appropriate supports and services.

44. The evidence from testimony showed that Respondent did not advise Petitioner about the availability of regular education preschool classes offered by Respondent during the recorded IEP meetings. There is no dispute that Respondent never offered any of their regular education preschool classes to *Student* as a placement. There was no IEP Team meeting to discuss the different placement in

which the services would be delivered. There was no alteration of the IEP itself to address delivery in a regular classroom. There was simply no discussion as a Team about the need for modifications of the proposed services in light of the switch from delivery in the self-contained classroom to the delivery of the same services at *OPH*.

45. The evidence shows that the special education providers assigned to *Student* were simply released by *Ms. M.G.* to start serving *Student* in his private preschool, and they began serving *Student* there. (Tr., Vol. 7, 1207:19-1208:14 (April 3, 2009) (Testimony of *Ms. L.C.*)). As will be discussed below, they did so with uniform success. The absence of any significant alteration, modification, or even a rethinking of the delivery of services is compelling evidence that, when they developed the IEP, *Student's* IEP Team believed that *Student* could be satisfactorily educated in a regular education setting.

46. While it is clear that Respondent was steadfast in refusing to offer *Student* a placement in one of its regular education preschool classrooms (e.g., one of the regular education preschool classes also housed in P Elementary School), it is not clear why. *Student's* parents and advocates repeatedly made direct inquiries about what regular education placements the County offered. Ex. P10 at 13:50; (July 30 IEP Meeting)). Uniformly, the County's IEP Team members uniformly failed or refused to reveal to *Student's* parents and advocates that there were many regular education preschool placements in the County. (Id. at 15:40-19;).

47. A very different picture emerged at the hearing, however. For example, *Ms. M.G.* revealed in testimony that, at the time *Student's* IEP was being developed, Respondent had preschool EC placements at P Elementary School, "More at Four and Head Start classrooms were there." (Tr. Vol 5, 835:10-836:14 (March 27, 2009) (Testimony of *Ms. M.G.*)), but they also had other Title I rooms and placed children at Developmental Day Centers. (Id at 874:13-875:11) *Ms. L.C.* confirmed that students like *Student* could be placed in Title I and Head Start Classrooms. (Tr., Vol., 6, 1130:6-1 (April 2, 2009) (Testimony of *Ms. L.C.*) Id, 1135:12-20 (Testimony of *Ms. L.C.*); Id 1137:6-1139:25 (Testimony of *Ms. L.C.*))

48. Respondent's failure to reveal the existence of regular education preschool classrooms caused the IEP Team to bypass the LRE methodology required under the Act. Specifically, the IEP Team did not ask whether "the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily," 20 U.S.C.A. § 1412(a)(5)(A), before offering an IEP that removed *Student* from the regular education setting completely.

49. In light of the foregoing, the Court concludes that Petitioners have proven by a preponderance of the evidence that the County's IEP deprived *Student* of his right to a FAPE because the IEP proposed to educate *Student* in a placement that was not the Least Restrictive Environment. The Court makes this conclusion based solely on the information that was available to the IEP Team at the time the IEP was developed.

50. To determine whether a private placement is appropriate for purposes of reimbursement under the IDEA, the Supreme Court and this Circuit have developed an



analysis of relevant factors. One factor appropriate to the Court's analysis is whether the child has made "actual progress." M.S. ex rel. Simchick v. Fairfax County School Bd., 553 F.3d 315, 327 (4th Cir. 2009) (stating that "the district court's decision correctly followed precedent" when it considered the child's "actual progress" and holding that "the district court's decision to consider M.S.'s actual progress as a factor in determining whether the [private] placement was proper"). Often, this factor does not weigh in favor of a parentally designed private placement. See, e.g., *Id.*

51. However, the record in this case is replete with evidence of *Student's* progress while enrolled in his private placement. Similarly, *Student's* occupational therapist conducted a review of her goals and objectives and found much improvement, causing her to reformulate her targets. (Pet Exs. 16, 22; Tr. Vol. 3 532:2-533:13, (March, 24, 2009) (Testimony of Kahn).

52. While the standard for evaluating the appropriateness of a private placement under the IDEA is generally prospective, objective factors such as actual educational progress are relevant in making the final determination of appropriateness under the IDEA. See County Sch. Bd. of Henrico v. R.T., 433 F. Supp. 2d 657, 675 (E.D. Va. 2006); compare Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999) w *M.M.*, 303 F.3d at 532. Actual educational progress is not a dispositive factor, but it is a factor to be considered in determining the appropriateness of an educational program under the IDEA. *M.M.*, 303 F.3d at 532; see also Rowley, 458 U.S. at 207, fn28 ("achievement of passing marks and advancement from grade to grade . . . [are an] important factor in determining educational benefit").

53. *Student's* progress was confirmed by the testimony and report of Dr. Naftel, providers' recent progress notes and reports, and standardized test data. All such information demonstrated that *Student* made significant progress at Our Playhouse. Virtually every witness in this case confirmed *Student's* progress while at Our Playhouse.

54. Respondent failed to rebut the evidence of *Student's* progress. In fact, Respondent's witnesses were uniformly unwavering in their conclusion that *Student* was making "remarkable" progress at Our Playhouse. (Tr. Vol 8, 1485:2-7 (April 6, 2009)(Testimony of Ms. W.G.); *Id.* 1501:11-21 (Testimony of Ms. W.G.).

55. Petitioners have demonstrated by a preponderance of the evidence that *Student* made actual progress toward mastering his IEP goals under Respondents' private educational placement.

56. Without erroneously applying a "least restrictive environment" requirement upon the parents' private placement, Respondent finds it significant that *Student's* "remarkable" progress towards his IEP goals occurred in a setting with no identified children with disabilities. (Tr. Vol, 3, 503:21-25 (March 24, 2009) (Testimony of Dorothy Hoyle). *Student* was the only child identified as such in his class of 16 preschoolers at Our Playhouse. *Id.* (Tr. Vol, 4, 649:6-16 (March 26, 2009) (Testimony of Sadie Bauer).

57. A "least restrictive environment," defined as the educational environment suitable for the disabled student that is most similar to the public school environment in

which non-disabled children are educated, is required under the Act. County Sch. Bd. Of Henrico, 433 F. Supp. 2d at 660 (citing 20 U.S.C. 1412); School Bd. v. Malone, 762 F.2d 1210, 1213 (4th Cir. 1985). However, mainstreaming [or the providing education in the least restrictive environment] is a policy to be pursued so long as it is consistent with the IDEA's primary goal of providing disabled students with an appropriate education, and when necessary for educational reasons, assumes a subordinate role in formulating an educational program. Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1002 (4th Cir. 1997).

58. The Fourth Circuit has held that the least restrictive environment requirement of the *IDEA*, 20 U.S.C. § 1412(5)(A), does not apply to parental placements. (See, e.g., Carter, 950 F.2d at 160; Morgan v. Greenbrier County Bd. of Educ., 83 Fed. Appx. 566, 568 (4th Cir. 2003). The Fourth Circuit has explained, "the Act's preference for mainstreaming was aimed at preventing *schools* from segregating handicapped students from the general student body." Carter, 950 F.2d at 160 (emphasis in original).

59. Furthermore, other Circuits addressing the issue have held that the least restrictive environment requirement does not apply with the same force to parental placements as it does to placements advocated by school districts. See M.S. ex rel. S.S., 231 F.3d at 105 (stating that mainstreaming "remains a consideration" but noting that parents "may not be subject to the same mainstreaming requirements"); Cleveland Heights-University Heights Sch. Dist. v. Boss, 144 F.3d 391, 399-400 (6th Cir. 1998) (failure to meet mainstreaming requirements does not bar reimbursement).

60. While it is clear that the least restrictive environment requirement should not be applied in the strictest sense, the Fourth Circuit does treat the policy considerations underwriting the LRE requirement to be a relevant factor in determining whether the a private placement is "appropriate" for purposes of the equitably reimbursement analysis. M.S. ex rel. S.S., 231 F.3d at 105. Those policy considerations "bear[] upon the parents' choice of an alternative placement and may be considered by the hearing officer in determining whether the placement was appropriate. *Id.*

61. Therefore, Respondent finds it appropriate to consider non-restrictive nature of Our Playhouse in its determination that the parent's private placement was appropriate. To be clear, however, the Court is not ordering reimbursement in this case solely because Playhouse is the Least Restrictive Environment or solely, because it is less restrictive than the placement that Respondent proposed for *Student*. Instead, the Court is weighing the non-restrictive nature of the parent's program, which the Court finds provide appropriate opportunities for working on the same goals that were agreed upon by the Respondent in *Student's* IEP, and adequate time with and exposure to typical peers (an implied (if not express) requirement of *Student's* IEP). The non-restrictive environment at Playhouse is one factor supporting the appropriateness of that placement under the IDEA, particularly when coupled with the fact that *Student's* progress in that preferred environment was "tremendous," "remarkable," "good." (See e.g. Tr. Vol 8, 1487:1-1485:2 (April 6, 2009 testimony of Ms. W.G.); Pet Ex. 16)

62. The parents' private placement offers a striking contrast to the Respondent's proposed placement in a highly restrictive, highly controlled, and limited environment at P Elementary School. The Court concludes that Respondent's offered placement is one in which *Student* "simply has no room to grow and mature." M.S. v. Fairfax County School Bd. 2007 WL 1378545 (E.D.Va., 2007. Dist. Ct. Order, *overruled on other grounds*, M.S. ex rel. S.S., 231 F.3d. The parent's placement is rich with precisely the kind of spontaneous peer interaction. Only with the specialized instruction and related services provided and paid for by *Student*'s parents, the parents' placement provides group teaching, and behavioral training that the IEP's goals expressly contemplate. Accordingly, while the parents were not required to provide a private program in the "least restrictive environment," the fully non-restrictive nature of Petitioners' program at Our P Elementary School bolsters this Court's conclusion that the parents' private placement was "appropriate" under the IDEA.

63. Respondent did not offer substantial evidence to rebut Petitioners' evidence that *Student*'s private placement was not appropriate under the standards established the Fourth Circuit.

64. Petitioners' private placement at Our Playhouse with specialized instruction, and related services was appropriate at the time that Petitioners enrolled *Student* on September 2, 2009, and continued to be an appropriate placement for *Student* at the time of the hearing. The preponderance of the evidence established that under the standard of Rowley, *Student* received sufficient educational benefit when he received: (1) special education services for 37.5% of his preschool day from 8:45 am until 12:30 pm, (2) 2 hours per week of occupational therapy, (3) one hour per week of speech and language services, and (4) 30 minutes per week of speech and language services on articulation.

### **FINAL DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that:

1. Petitioner proved that by a preponderance of the evidence that Respondent:

- a. failed to provide *Student* with a free, appropriate public education through the development of an Individualized Education Plan (IEP), and
- b. failed to provide *Student* with a free, appropriate public education through an IEP that was reasonably calculated to provide *Student* with educational benefit.

2. Petitioner proved by a preponderance of the evidence that Respondent failed to provide *Student* a free, appropriate public education in the least restrictive environment as required by 20 USCA § 1412(a)(5)(A).

3. Petitioner proved by a preponderance of the evidence that Respondent procedurally and substantively failed to provide *Student* a free, appropriate public

education by failing to provide *Student* with educational services before October 28, 2008, the date Respondent first provided services to *Student* at his private preschool placement.

4. Petitioner proved by a preponderance of the evidence that Petitioners' private educational placement was appropriate, and they are entitled to reimbursement for costs and expenses as provided in the above Conclusions of Law.

5. Based on the foregoing Findings of Fact and Conclusions of Law, Petitioners are entitled to the equitable remedy of reimbursement of the following costs Petitioners incurred in educating *Student* including:

a. compensation for the private tuition costs at *OPH* from September 2008 through December 2008 from 8:45 pm until 12:30 pm Monday through Friday,

b. compensation for all costs for private special education services provided by New Hope ASD Consulting from July 31, 2008 until October 28, 2008,

c. compensation for private special education services by New Hope ASD Consulting for four hours per week from October 28, 2008 until the end of Respondent's 2008-2009 school year,

d. costs for speech and language instruction, and occupational therapy incurred for the entire 2008-2009 school year beginning on August 25, 2008.

6. The Court finds that Petitioners' expenses were reasonable and necessary to provide *Student* with an appropriate private educational placement. The actual costs to be reimbursed were established through documentary (Pet Ex. 81) and testimonial evidence. (Tr. Vol. 4, 675-689- Testimony of *Mother*) Reimbursement shall not include consultants' costs in preparation of IEP meetings or for consultants to attend IEP meetings. Petitioners were not seeking reimbursement for verbal behavioral therapy during the summer of 2008. (See Findings) The Court also awards Petitioners any additional, equitable remedies tailored to address the specific deprivations that were established by the evidence in this case.

### **NOTICE**

In order to appeal this final decision, the party seeking review must file a written notice of appeal with the Director of the Exceptional Children's Division, North Carolina Department of Public Instruction.

Under federal law and in accordance with 20 U.S.C. § 1415(f) the parents involved in a complaint "shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." A decision made in a hearing conducted pursuant to (f) that does not have the right to an appeal under subsection (g) may bring civil action in State court or a district court of the United States. See 20 U.S.C. § 1415(i).

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 *et seq.*) and particularly N.C.G.S. § 115C-109.9, "any party aggrieved by

the findings and decision of a hearing officer under G.S. 115C-109.6 (a contested case hearing). . . may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C-107.2(b)(9) to receive notices.” The State Board, through the Exceptional Children Division, shall appoint a Review Officer who shall conduct an impartial review of the findings and decision appealed.

In North Carolina, in which the hearing is conducted by the state and appealed to a state review official, the state review official's decision would be considered the “official position of the state educational agency.” *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 \*1 (M.D.N.C.) The decision of the review officer is limited to whether the evidence in the record supports the findings of fact and conclusions of law and whether the conclusions of law are supported by and consistent with state and federal law. The review officer must also consider any further evidence presented in the appeal process.

In accordance with N.C. Gen. Stat. § 150B-36 each finding of fact contained in the Administrative Law Judge's decision shall be adopted unless the finding is clearly contrary to the preponderance of the evidence in the record. For each finding of fact not adopted, the reasons for not adopting the finding of fact and the evidence in the record relied upon shall be set forth separately and in detail. Every finding of fact not specifically rejected as required by Chapter 150B shall be deemed accepted for purposes of judicial review. For each new finding of fact that is not contained in the Administrative Law Judge's decision, the evidence in the record relied upon shall be set forth separately and in detail establishing that the new finding of fact is supported by a preponderance of the evidence in the official record.

Inquiries regarding further notices and time lines, should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina.

This is a Final Decision.

This the 18<sup>th</sup> day of June, 2009.

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Melissa Owens Lassiter  
Administrative Law Judge